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APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

PEYTON BERBLING (W. C. SPOMER, SUCCESSOR TO PEYTON BERBLING), ET AL.,

Petitioners,

vs.

EZELL LITTLETON, ET AL.,

Respondents.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1395

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his Father and Next Friend, HOBERT LAMBERT, MORRIS GARRETT, by his Father and Next Friend, LEVI GARRETT, individually and as representatives of a class,

Plaintiffs-Appellants,

v.

PEYTON BERBLING, individually and as State's Attorney for Alexander County, Illinois, EARL SHEPHERD, individually and as investigator for Peyton Berbling, CARL MEISENHEIMER, as Police Commissioner of the City of Cairo, Illinois, MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois, and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Illinois.

No. 70-103

WILLIAM G. JUERGENS, *Judge.*

Argued March 1, 1972—Decided October 6, 1972

Before SWYGERT, *Chief Judge,* PELL, *Circuit Judge,* and DILLIN, *District Judge.**

PELL, *Circuit Judge.* This appeal is from a dismissal by the district court of plaintiffs' amended complaint. Plaintiffs brought this action under 42 U. S. C. §§ 1981, 1982, 1983 and 1985, seeking in addition to damages, injunctive relief for claimed deprivations, under color of law, custom and usage of Cairo, and Alexander County, Illinois, of various rights and immunities secured to plaintiffs and members of their class under the Constitution of the United States and the above-named sections of Title 42. Jurisdiction was founded on 28 U. S. C. §§ 1331 and 1343.

This court, in reviewing the district court's dismissal of plaintiffs' amended complaint, must construe the amended complaint liberally and consider all of the factual allegations to be true, resolving any doubts in plaintiffs' favor. *Jung* v. *K. & D. Mining Co.,* 260 F. 2d 607, 608 (7th Cir. 1958); *Contract Buyers League* v. *F & F Investment,* 300 F. Supp. 210, 214 (N. D. Ill. 1969), *aff'd sub nom. Baker* v. *F & F Investment,* 420 F. 2d 1191 (7th Cir. 1970), *cert. denied,* 400 U. S. 821. We are not here concerned whether the plaintiffs will be able to adduce competent proof of their allegations.

Plaintiffs, in substance, charge that the defendants, functionaries of Alexander County, have systematically applied the state criminal laws so as to discriminate against plaintiffs and their class on the basis of race, interfering thereby with the free exercise of their constitutional rights.

The named plaintiffs, with two exceptions, are black citizens of Cairo. The plaintiffs, allegedly financially poor

* District Judge S. Hugh Dillin of the Southern District of Indiana is sitting by designation.

persons, name as their class all other persons similarly situated, presumably as to race and poverty.

Defendant Berbling is the State's Attorney for Alexander County. Defendant O'Shea at the time of the commencement of this suit was a Magistrate of the Circuit Court for Alexander County and on July 1, 1971, became an Associate Judge of Alexander County. Defendant Spomer is an Associate Judge of the Circuit Court for Alexander County. Defendant Shepherd is an investigator for defendant Berbling, but is not himself an Assistant State's Attorney.

As to each of the defendants, it is alleged that since the early 1960's, black citizens of Cairo have been actively seeking equal opportunity and treatment in such areas as employment, housing, education and ordinary day-to-day relations with white citizens and officials of Cairo. One of the important manifestations of the equality quest is the participation by the plaintiffs and their encouragement of others to do likewise in an economic boycott of local merchants deemed to have engaged in racial discrimination. The equality quest allegedly has generated and continues to generate substantial tension and antagonism from the white citizens and officials. It appears that in addition to the boycott there were peaceful demonstrations.

We now turn to the allegations pertaining to particular defendants, treating such charges as true for the purpose of this appeal.

BERBLING CONDUCT

Berbling engages in a pattern and practice of refusing to permit black citizens to give evidence of criminal conduct committed by white citizens against black citizens. He refuses to initiate criminal proceedings against white citizens arising out of assaults and batteries committed

by them against black citizens. He refuses to proceed on black citizen complaints by information or complaint but submits such matters to a grand jury in those instances in which he permits complaints to be filed. He interrogates the black citizens before the grand jury with the purposeful intent of depriving the black citizens of their right to present their evidence to the grand jury. In some instances before the grand jury, he declines to interrogate the black complainants at all. When white persons are prosecuted on the basis of complaints by plaintiffs, Berbling engages in a practice of inadequately prosecuting in order to lose the cases or to settle them on terms more favorable than those accorded black persons. He engages in the practice of requesting or recommending greater bonds and sentences in cases involving black persons than those of white persons. He engages in a practice of bringing significantly more serious charges against plaintiffs for conduct which would result in no charge or a minor charge against white persons.

All of the above alleged practices are assertedly carried on by Berbling "wilfully and maliciously with the intent (a) to deprive plaintiffs of the benefits of the criminal justice system, (b) to deprive plaintiffs of their right to give evidence against those who threaten their security, peace and tranquility and to deprive plaintiffs of their right to hold property to the same extent as is enjoyed by white citizens, and (c) to deter plaintiffs from engaging in a peaceful boycott and other activities protected by the First Amendment."

Specific instances of illustrative supporting conduct pertaining to named individual plaintiffs are set forth in the amended complaint.

SHEPHERD CONDUCT

He engages in a pattern and practice of refusing to permit plaintiffs to give evidence against white persons respecting acts threatening the personal safety of plaintiffs. The illustrative specific incident, however, is that Shepherd refused to permit one of the plaintiffs, because of her race, to file criminal charges against a white man who had kicked her in the stomach while she was peacefully demonstrating "against the racially discriminatory practices of merchants and public officials."

The example in the complaint seems questionably illustrative of the allegation with regard to the discriminatory pattern and practice and, in any event, there would seem to be some question of Shepherd's authority to decline to file criminal charges as he, as we understand it, was an investigator only.

SHEPHERD and BERBLING CONDUCT

A conspiracy is charged against Berbling and Shepherd in that they engage in conduct that prevents plaintiffs because of their race from giving evidence against white persons respecting acts threatening plaintiffs' personal safety.

The illustrative example was the same incident alleged as to Shepherd individually except that here it is alleged that Shepherd, "at Berbling's direction, and because of her race, refused to allow" the filing of the complaint.

Questions existing here also arise from the specific illustration utilized.

SPOMER and O'SHEA CONDUCT

Spomer and O'Shea, as judges, engage in a pattern and practice of discriminatory conduct based on race as follows: They set bond in criminal cases by following an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require plaintiffs and members of their class, when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid, to pay for a trial by jury.[1]

We have attempted in the foregoing summary to provide a condensation of the principal allegations of a 21-page complaint. We do not commend the amended complaint as a model of pleading but we also recognize that uncharted fields were being plowed. Matters of which an entire community may be cognizant may well pose almost insuperable difficulties when the attempt is made to articulate these matters into the "short and plain statement" required by Rule 8(a), Fed. R. Civ. P.

It has been said that in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise "every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts under the Civil

1. Since *Tate* v. *Short*, 401 U. S. 395 (1971), it has been unlawful to convert a fine into a jail sentence for those who are unable to pay. Nor is there any constitutional requirement of a jury trial for offenses which do not have a potential jail sentence. *Baldwin* v. *New York*, 399 U. S. 66 (1970), and *Argersinger* v. *Hamlin*, 40 U. S. L. W. 4679, 4680 (U. S. June 12, 1972). Thus, unless plaintiffs are alleging that only they and members of their class were forced to pay for jury trials in this context, there has been no constitutional deprivation on this point.

Rights Act." *United States ex rel. Hoge* v. *Bolsinger*, 211 F. Supp. 199, 201 (W.D. Pa. 1962), *aff'd*, 311 F. 2d 215 (3rd Cir. 1962), *cert. denied*, 372 U. S. 931 (1963).

Nevertheless, we recognize the underlying motivation of federal pleading to be to avoid the semantical donnybrooks inherent in differentiating what is evidence, ultimate facts and conclusions of law and fact. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1218, at 133 et seq. (1969). We deem it preferable that dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff. Wright & Miller, *supra*, § 1214, at 107. This, of course, does not provide a carte blanche for unlimited successive complaint amendments, and the ultimate duty of pleading his case rests upon the party and not upon the district court to divine what is not reasonably there.

The approach which we find should be applied here is aptly stated in *Kamen Soap Products Co.* v. *Struthers Wells Corp.*, 159 F. Supp. 706, 713 (S.D.N.Y. 1958), as follows:

> "While the complaint is prolix and contains a large amount of unnecessary detail and evidentiary matter, it clearly apprises defendants of the claims they are called upon to meet. Motions to dismiss under the Federal Rules on such grounds as these are not favored."

See also Byrd v. *Bates*, 220 F.2d 480, 482 (5th Cir. 1955).

The appeal here is taken from the dismissal which the district court rested on two grounds, lack of jurisdiction and judicial immunity. It is the propriety of this ruling which is all that is before us and which we now consider in the light of the applicable law. We do not, as we have already indicated, venture any opinion as to whether the plaintiffs will be able to prove the concerted pattern

of officially sponsored racial discrimination under color of law, custom and usage as here alleged.[2]

LACK OF JURISDICTION

The district court treated the case insofar as an injunction was sought as being an effort to have the federal court sit as a court of review over the acts and actions of duly elected county officials.

The court's memorandum and order states in part the following:

> ". . . What plaintiffs seek in their request for injunctive relief is merely to have this Court submit its judgment for the judgment of the above-named elected officials of Alexander County. Under the circumstances here presented, the Court does not have jurisdiction to entertain such a cause.
>
> "Plaintiffs cite cases in which federal courts have enjoined acts of elective state officials under certain circumstances, not here present. However, in none of the cases cited have the federal courts been granted power to substitute their judgment for that of the elected state officials. The matters complained of in the amended complaint as against the above-named elective officials are at most discretionary acts on their part.
>
> "Accordingly, that portion of the complaint seeking injunctive relief against the associate circuit judge, magistrate, state's attorney and assistant to the state's attorney will be dismissed for failure of jurisdiction in this Court."

The amended complaint primarily involves federal juris-

2. The term "creed" is used jointly or alternatively with "race" throughout the complaint but we fail to discern any basis for the use and the complaint seems bottomed only upon racial discrimination.

diction under 28 U.S.C. § 1343(3) and (4)[3] giving federal jurisdiction for deprivation of federally protected civil rights. In our reading of the complaint, violations of these rights have been alleged.

The test for determining whether jurisdiction exists is set out in *Bell* v. *Hood*, 327 U. S. 678, 682-683 (1946):

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for judgment on the merits and not for a dismissal for want of jurisdiction. . . . But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction."

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3. 28 U.S.C. §1343 reads as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Under this section, there is no requirement that the amount in controversy exceed $10,000. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 412 n. 1 (1968).

Plaintiffs also invoked 28 U.S.C. § 1331, which provides for federal question jurisdiction where the amount in controversy exceeds $10,000. Since there is doubt as to whether any of the claims for damages can be affirmed, we rest our finding of federal jurisdiction on 28 U.S.C. § 1343.

The present case clearly fits the above language from *Bell* v. *Hood,* and we must, therefore, hold that the district court erred in dismissing the complaint for want of jurisdiction as the alleged constitutional and statutory violations do "form the sole basis for relief" and the action is not "so patently without merit as to justify" the court's dismissal.

JUDICIAL IMMUNITY

In dismissing the case, while there was reference to want of jurisdiction, the district court's opinion stressed that the complaint sought to review matters of judicial discretion. It would seem that the dismissal was, in reality, one for failure to state a claim upon which relief could be granted, Rule 12(b)(6), Fed. R. Civ. P. It is on that alternative theory for the district court's actions that we will proceed.

Defendants contend that as judicial and quasi-judicial officers they were not liable in civil suits at common law and that the various civil rights acts did nothing to change this rule. Thus, we must first examine the legislative history of those acts to determine whether or not allegations such as those in the complaint before us were intended by Congress to be actionable. Simply stated, that question raises to issue whether or not Congress, in passing these acts, intended to eliminate the doctrine of judicial immunity. With that necessary background, we can then consider subsequent judicial decisions which have added substantial glosses to these statutes.

When Congress convened in December 1865, it faced a country that had been torn asunder by a great war. Undoubtedly to many members of Congress there was a clear threat that one reason for fighting the war, freedom and equality for blacks, might be lost. The first reaction of the South to defeat and emancipation had been shock

and "a simultaneous withdrawal of both races from the enforced intimacy and the more burdensome obligations imposed by the old regime on each [race]."[4] However, this reaction was shortlived:

> "The temporary anarchy that followed the collapse of the old discipline produced a state of mind bordering on hysteria among Southern white people. The first year a great fear of black insurrection and revenge seized many minds, and for a longer time the conviction prevailed that Negroes could not be induced to work without compulsion. . . . In the presence of these conditions the provisional legislatures established by President Johnson in 1865 adopted the notorious Black Codes. Some of them were intended to establish systems of peonage or apprenticeship resembling slavery."[5]

When Senator Trumbull of Illinois, Chairman of the Judiciary Committee, introduced S. 61 on January 5, 1866, it was with the view that strong legislation was necessary. This bill, which was to become the Civil Rights Act of 1866, sought to eliminate both state laws and private conduct which discriminated on the basis of race. In introducing the bill, Senator Trumbull "described its objectives in terms that belie any attempt to read it narrowly." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 431 (1968).[6]

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4. C. Vann Woodward, *The Strange Career of Jim Crow* (2nd revised ed. 1966), 22.

5. *Id.* at 23.

6. "Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." Senator Trumbull, Cong. Globe, 39th Congress, 1st Sess., 474.

Title 42 U.S.C. §§ 1981 and 1982 derive from the Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.[7] "In the House, as in the Senate, much was said about eliminating the infamous Black Codes. But, like the Senate, the House was moved by a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment." *Jones* v. *Alfred H. Mayer Co., supra,* 392 U. S. at 433.

In essence, what § 1 of the Civil Rights Act of 1866 intended was to eliminate those badges and indicia of slavery which were still a part of both Southern law and custom. *Civil Rights Cases,* 109 U. S. 3 (1883). But, not until *Jones* v. *Alfred H. Mayer Co., supra,* did the Supreme Court agree that Congress meant what it said in 42 U.S.C. § 1982, which by its own terms encompassed all racially motivated refusals to rent or sell without being limited to those acts sanctioned by the state, "under color of State law."

For the present case, the more important aspect of the Civil Rights Act of 1866 was § 2, which became Title 18 U.S.C. § 242.[8] As originally enacted this section provided,

> "§ 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on ac-

7. Title 42 U.S.C. § 1981 was reenacted with some additions after the ratification of the Fourteenth Amendment as the Civil Rights Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144. *San Mateo County* v. *Southern Pacific R. Co.,* 13 Fed. 145, 151 (C.C. Cal. 1882). Title 42 U.S.C. § 1982 flows directly from the Civil Rights Act of 1866, via R.S. § 1978.

8. "Section 242 first came into the law as § 2 of the Civil Rights Act, Act of April 9, 1866, 14 Stat. 27. After passage of the Fourteenth Amendment, this provision was re-enacted and amended by §§ 17, 18, Act of May 31, 1870, 16 Stat. 140, 144." *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961).

> count of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

The plain words of the statute would seem to include "any person" even prosecutors and judges, and this was the subject of extensive debate. When the bill was first being introduced, Senator Trumbull hesitated to say that it would reach conduct of judges.[9] However, as the debate moved on, Senator Stewart noted that the fugitive slave laws had done exactly what the opponents of the bill complained of, made criminal *all* actions by persons to effectuate state laws which Congress had determined to overthrow.[10]

The issue was clearly drawn in President Johnson's veto message on March 27, 1866,[11] where he gave as a major objection to § 2 of the bill that it would make legislators and judges criminally liable. The veto was overridden. In these final debates, Senator Trumbull, the bill's sponsor and principal advocate, stated,

> "But it is said that under this provision judges of the courts and ministerial officers who are engaged

9. Mr. Cowan. "Then I will ask if that does not come in conflict with another principle of law—whether a judge in a criminal court can be held responsible for the integrity of his intentions as to the decisions he makes?"

Mr. Trumbull. "That would involve many considerations, and they will be settled by the courts when they arise. If he is not responsible, I have faith that the judges of the United States courts will so decide." Cong. Globe, 39th Cong., 1st Sess. (1866), 475-476.

10. *Id.* at 500.

11. *Id.* at 1679-81.

> in the execution of any such statutes may be punished; and that is made an objection to this bill. I admit that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may be and ought to be punished; but if he acted innocently the judge would not be punished."[12]

It is significant to note in these debates that the acts of a legislator were viewed as probably not falling within the prohibition since the legislator himself in voting for a bill was not actually denying anyone his civil rights.

> Mr. Trumbull. "Who is to be punished? Is the law to be punished? Are the men who make the law to be punished? Is that the language of the bill? Not at all. If any person, 'under color of any law,' shall subject another to the deprivation of a right to which he is entitled, he is to be punished. Who? The person who, under the color of the law, does the act, not the men who made the law." Cong. Globe, 39th Cong., 1st Sess., 1758.

To further clarify the applicability of the Civil Rights Act of 1886 to just the sort of facts we have before us, we need only note the remarks of Congressman Lawrence who, in commenting on combinations of white persons organized to drive freedmen out of various communities, stated, "If States should undertake to authorize such offenses, or deny to a class of citizens all protection against them, we may then inquire whether the nation itself may be destroyed by this insidious means."[13] It appears to us that in 1866, in considering criminal sanctions, Congress clearly had decided to eliminate judicial immunity at least for *racially motivated intentional deprivations of civil rights.*

12. *Id.* at 1758.
13. *Id.* at 1835.

In 1870, after ratification of the Fourteenth Amendment, Congress decided to reenact some of the previously enacted provisions of the 1866 Act, probably with the view that if they were too broad to be constitutional under the Thirteenth Amendment they would be valid under the Fourteenth.[14] Thus, as noted above, 18 U.S.C. § 242 was reenacted and amended, as was 42 U.S.C. § 1981. Once again, the legislative history of the bill shows that Congress intended to cover a wide field, specifically enacting the predecessor to 18 U.S.C. § 241 which covered private conspiracies to deprive individuals of civil rights. Perhaps the most informative statements were those by Senator Pool of North Carolina in support of Sections 5, 6 and 7 of the Enforcement Act of 1870:

> "The civil rights bill was to be enforced by making it criminal for any officer, under color of any State law, 'to subject, or cause to be subjected, any citizen to the deprivation of any of the rights secured and protected' by the act. If an officer of any State were indicted for subjecting a citizen to the deprivation of any of those rights he was not to be indicted as an officer; it was as an individual. And so, under the fourteenth amendment to the Constitution, 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' There the word 'deny'

14. "Others supported the adoption of the [Fourteenth] Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd* v. *Hodge*, 334 U. S. 24, 32-33 (1948).

Section 18 of the Enforcement Act of 1870, was the portion which reenacted the previous Act:

> "*And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted. . . ."

> is used again; it is used in contradistinction to the first clause, which says, 'No State shall make or enforce any law' which shall do so and so. That would be a positive act which would contravene the right of a citizen; *but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.* It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, 'that Congress shall enforce by appropriate legislation the provisions of this article.'
>
> *"There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law."* (Emphasis added.)[15]

As the Supreme Court stated relative to the scope of § 241, "despite subsequent statements to the contrary, nothing in the records of the Congressional debates or the Joint Committee on Reconstruction indicates any uncertainty that its objective was the protection of civil rights." *United States* v. *Price,* 383 U. S. 787, 801 n. 9 (1966).

Admittedly, the crucial sections for plaintiffs—that is, the ones most central to their complaint—are 42 U.S.C. §§ 1983 and 1985(3). But, in discussing their legislative history to determine congressional intent, it is clearly relevant to consider the above discussion of 18 U.S.C. §§ 241, 242, as they are the criminal analogues to the civil remedies provided in §§ 1983, 1985(3). In fact, the Supreme Court in determining how the phrase "under color of" should be interpreted stated, "Thus, it is beyond doubt that this phrase should be accorded the same construction

15. Cong. Globe, 41st Cong., 2nd Sess., 3611.

in both statutes—in § 1979 [now 42 U.S.C. § 1983] and in 18 U.S.C. § 242." *Monroe* v. *Pape*, 365 U. S. 167, 185 (1961). So in deciding what Congress meant when it referred to "[e]very person" in 42 U.S.C. § 1983, it is significant that Congress had earlier rejected specifically absolute judicial immunity by passing the Civil Rights Act of 1866.

As to the congressional debates surrounding the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13,[16] the very title of the bill reflects one of the main concerns that Congress had. On March 23, 1871, President Grant sent the following message to Congress:

> "A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States."[17]

The debates are replete with references both to private conspiracies and to inaction by state officials to curtail such activity."[18]

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16. 42 U.S.C. § 1983 derives from § 1 of this Act and 42 U.S.C. § 1985(3) from § 2 of the Act.

17. Cong. Globe, 42nd Cong., 1st Sess., 244.

18. Mr. Lowe. "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst felons could devise, have gone unwhipped of

As Mr. Justice Douglas said in *Monroe* v. *Pape*, 365 U. S. 167, 174-75 (1961), "[An] aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. . . . It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.' " Thus, it should be noted that while the primary evil sought to be checked was the Ku Klux Klan, 42 U.S.C. § 1983 applies not to Klan members but to those who, acting for the state, refuse or do not attempt to enforce state laws to protect all citizens. That the state laws themselves might appear on their face to be nondiscriminatory and yet be applied to protect only certain classes of citizens was stressed in the debates.[19] Nowhere is the present

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justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42nd Cong., 1st Sess., 374.

Mr. Beatty. ". . . States have denied to persons within their jurisdiction the equal protection of the laws. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. *The State, from lack of* power or *inclination, practically denied the equal protection of the law to these persons.*" *Id.* at 428. (Emphasis added.)

Senator Osborn. "That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed." *Id.* at 653.

19. Mr. Burchard. "If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to

case more clearly shown to be encompassed by exactly the type of discrimination sought to be remedied by the Ku Klux Klan Act than in the statement of Senator Pratt of Indiana relating to discrimination against Negroes and Union sympathizers in enforcing criminal laws:[20]

"Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the

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secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws." Cong. Globe, 42nd Cong., 1st Sess., App. 315.

Mr. Hoar. "Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens." *Id.* at 334.

Mr. Stevenson. "Denial may, therefore, be either active or passive. It is more frequently passive than active. That of Providence is nearly always passive; withholding, not giving, not granting is denying. . . . Unexecuted laws are not 'protection.' And this brings us to the very case: the States have laws providing for equal protection, but they do not, because either they will not or cannot, enforce them equally; and hence a class of citizens have not 'the protection of the laws.'" Cong. Globe, 42nd Cong., 1st Sess., App. 300.

20. It should be noted that the discrimination with which Congress was concerned was not purely racial but also included that against that class of whites who had Union sympathies. Nevertheless, the discrimination was against classes of people and not just specific individuals.

provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.

"But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the doors of her temples."[21]

Although Congress did substantially weaken § 2 of the bill (the predecessor of 42 U.S.C. § 1985(3)) which had sought to federalize virtually all state criminal laws, the intent of § 1 of the bill was and remained, at least in part, to hold liable those whose inaction caused or allowed to increase such criminal activity against given classes of citizens, since Congress was quite clear that such action constituted a deprivation of equal protection under the law which is a "deprivation of . . . rights . . . secured by the Constitution."[22]

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21. Cong. Globe, 42nd Cong., 1st Sess., 505.

22. Mr. Pratt. "Though the laws do not in terms discriminate against them, still the fact is that they invoke their protection in vain in a great many localities, counties, and districts. There is either such a condition of public sentiment that they cannot be executed, or there is a complicity with their oppressors on the part of the officers who should, but do not, execute them.

"Now, sir, is not this state of things a practical denial of the equal protection of the laws? One of the definitions of the verb 'deny' is 'not to afford; to withhold.' Now, can it with fairness be said this equal protection is not denied, when it is withheld, when it is not afforded? Is there not a positive duty imposed on the States by this language to see to it—not only that the laws are equal, affording protection to all alike, but that they are executed, enforced; that their protection is noth withheld, but afforded affirmatively, positively, to all in equal degree." Cong. Globe, 42nd Cong., 1st Sess., 506.

"The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers

One further aspect of legislative history must be noted. In discussing the scope of the coverage of the Ku Klux Klan Act, Mr. Hoar stated that it would only interfere where "evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessing of the republican government altogether."[23] Although this gloss has not been closely followed in many cases, *e.g.*, *Monroe* v. *Pape*, *supra*, the fact that a situation of this nature exists, as alleged in the present complaint, would certainly seem to increase the logic of applying the statute as it is written, and not unduly narrowing it. As the Supreme Court has recently stated,

> "This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum* v. *Foster*, 40 U.S.L.W. 4737, 4742. (U. S. June 19, 1972.)

In sum, ignoring for the time being the issue of immunity, it is clear that the complaint does state a cause of action against the judges under 42 U.S.C. §§ 1981, 1983 (and perhaps under 42 U.S.C. § 1982) since the judges are alleged to have imposed heavier fines and sentences and higher bails on plaintiffs' class than on the white

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are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." *Ex parte Virginia*, 100 U. S. 339, 347 (1879).

"[T]he remedy created was not a remedy against it [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. at 175-176. (Emphasis in original.)

See also discussion of *United States* v. *Classic*, at note 25, *infra*.

23. Cong. Globe, 42nd Cong., 1st Sess., 334.

citizens of Cairo. As against Berbling and Shepherd, it would appear that a violation of 42 U.S.C. § 1983 has been alleged in that they have denied to various plaintiffs equal access to the criminal justice system.[24] Further, it is clear that the failure to do one's duty is actionable under the statute as passed by Congress. Thus, criminal liability can attach from such a failure as in *United States* v. *Classic*, 313 U.S. 299 (1941).[25] Finally, the fact that 42 U.S.C. § 1981 does not itself contain a remedy is no objection. In a similar situation the Supreme Court stated, "[t]he fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." *Jones* v. *Alfred H. Mayer Co., supra*, 392 U.S. at 414 n. 13. And more recently,

24. In a different context, a class action by indigent plaintiffs challenged a city ordinance requiring a fee for issuance of an arrest warrant. The Fifth Circuit held that the complaint stated a cause of action:

> "It is well to note in connection with this controversy that a citizen has no constitutional right to have an arrest warrant issued. The only constitutional right involved here is the citizen's ability to set in motion the governmental machinery which redresses violations of municipal ordinances; *i.e.*, the right to seek an arrest warrant. Costs such as the fee in question here, no less than court costs, may be imposed but the teaching of Griffin v. Illinois, supra, is that concepts of equal protection in the administration of criminal law dictate that a poor person is not to be denied access to the criminal procedure process solely because of poverty." *Lane* v. *Correll*, 434 F. 2d 598, 600 (5th Cir. 1970)

25. In *Classic*, the second count of the indictment charged the Commissioners of Election with a deprivation of constitutionally protected rights "by the willful failure and refusal of defendants to count the votes as cast. . . ." 313 U. S. at 309. Although the court did not pass on the sufficiency of the indictments because the appeal was a direct one following the district court's sustaining a demurrer, it is clear that plaintiffs' theory is not novel. *See also Picking* v. *Pennsylvania R. Co.*, 151 F.2d 240, 250 (3rd Cir. 1945), overruled on another issue, *Bauers* v. *Heisel*, 361 F.2d 581 (3rd Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969).

it was held that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies. See *Texas & N.O.R. Co.* v. *Railway Clerks,* 281 U. S. 548, 569-570." *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969).

This approach is not particularly new in federal jurisprudence. In one of the earliest and most frequently cited opinions of the Supreme Court, Chief Justice Marshall phrased the inquiry in the following terms:

> "This brings us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
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> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford that protection . . . . [Blackstone in his Commentaries states] '. . . for it is a settled and invariable principle in the laws on England, that every right, when withheld, must have a remedy, and every injury its proper redress.'
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> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case." *Marbury* v. *Madison,* 1 Cranch (5 U. S.) 137, 162-163 (1803).

Having determined, in the light of the relevant statutory and case history, that on its face the complaint states a cause of action, we must consider whether defendants' alleged immunity necessarily bars the relief sought. Clearly, the statutes themselves are silent on the issue of immunity save for the fact that the term "every person" is used. The legislative history presents a strong case for

finding that most immunities were meant to be swept away, at least for intentional deprivation of a class's rights.

Yet, the plain words of the various Civil Rights Acts have not always fared well in the courts. As the Northern ardor for further congressional legislative protection of the rights of Negroes dimmed and was virtually extinguished in 1877,[26] so did the courts follow a similar pattern. In the *Civil Rights Cases,* 109 U.S. 3 (1883), the Supreme Court invalidated the 1st and 2nd Sections of the Civil Rights Act of 1875 which dealt with discrimination in public accommodations. The Court held that the Thirteenth Amendment related solely to badges and incidents of slavery,[27] that the Fourteenth Amendment re-

26. Concerning the election of 1876 and the Compromise of 1877, Samuel Eliot Morison wrote,

> ". . . when the first returns came in it seemed that he [Tilden] had won, but the votes of three Southern States and Oregon were doubtful, and without them Tilden had only 184 electoral votes; if the Republicans carried those four states, Hayes would have 185.
>
> "From all four disputed states came two sets of electoral votes. In South Carolina, Florida, and Louisiana, still under carpetbag rule, the election boards had thrown out thousands of Democratic votes on the ground of fraud or intimidation. Congress met the problem by setting up an electoral commission. . . . [T]here seems no doubt that a deal was made by the Republicans with Southern Democratic leaders, by virtue of which, in return for their acquiescence in Hayes's election, they promised on his behalf to withdraw the garrison and to wink at non-enforcement of Amendment XV, guaranteeing civil rights to the freedmen." S. E. Morison. *The Oxford History of the American People* (1965), pp. 733-734.

27. "The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth

quired state action, and that private discrimination in accommodations fell within neither category.[28] Thus, it has been only recently that the Court has decided in handling the various Reconstruction civil rights statutes to "'accord [them] a sweep as broad as [their] language.' *United States* v. *Price,* 383 U. S. 787, 801; *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 437." *Griffin* v. *Breckenridge,* 403 U. S. 88, 97 (1971).

Turning to judicial immunity from suit, one of the first major cases is *Bradley* v. *Fisher,* 80 U. S. 335 (1871).[29] The Court held that the judge was immune from suit as long as he had jurisdiction of the subject matter, no matter how irregular his actions might have been, nor how malicious or corrupt his motives might be. Such immunity was deemed essential to preserve the independence of the judiciary.[30]

Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery constituting its substance and visible form . . . ." *Civil Rights Cases,* 109 U. S. 3, 22 (1883).

28. We need only note in passing that the decision was greeted with great relief in much of the national press. 2 Charles Warren, *The Supreme Court in United States History* (1926), p. 604 et seq. The test of time has cast the lie to Warren's hopeful analysis:

> "Viewed in historical perspective now, however, there can be no question that the decisions in these cases were most fortunate. They largely eliminated from National politics the negro question. . . ." *Id.* at 608.

29. Plaintiff, an attorney, had sued to recover damages from the defendant, a justice of the Supreme Court of the District of Columbia, who had ordered Bradley's name stricken from the role of attorneys as a result of certain remarks Bradley had made to him during the trial of John Suratt for the murder of Abraham Lincoln. An earlier case to the same effect is *Randall* v. *Brigham,* 74 U. S. (7 Wall.) 523 (1868).

30. "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with

But *Bradley*, although one of the earliest cases in which the Court approved of judicial immunity, was a common law action, not a case arising under any of the civil rights acts. Thus, it did not answer the question whether those acts had abolished such common law immunity. The first case in that category was *Ex parte Virginia*, 100 U. S. 339 (1879). There, a judge of a Virginia county court was indicted under the predecessor of 18 U.S.C. § 243 for excluding from the grand and petit jury lists black citizens who were otherwise qualified. The petition for habeas corpus was filed on behalf of the judge to determine if the district court below had jurisdiction or any authority to act—essentially a test of the validity of the statute. After holding that Congress had power under the Thirteenth and Fourteenth Amendments to enact such a law, the Court faced the petitioner's claim that he was immune since he was acting in the performance of a judicial act. The Court rejected the contention holding that the acts charged were not judicial, but merely ministerial.[31] However, in what may be regarded as an alternate ground for the holding, the Court went on to add,

> "But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him

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the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful." 80 U. S. at 347.

31. "It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . It is merely a ministerial act. . . ." 100 U. S. at 348.

> no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing." 100 U. S. at 348-349.

Thus, it would appear a judge can be held criminally liable for ministerial actions or actions "not within the limits of his discretion."

One of the few cases to hold a judicial officer liable for damages was *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240 (3rd Cir. 1945). There the district court had dismissed the complaint against a variety of defendants, including Keiffer, a justice of the peace. Plaintiffs alleged that when they were illegally arrested they sought to obtain their release at a hearing before Keiffer but that Keiffer refused to hold any hearing as he was required to do by law.

> "If these allegations be proved it may be concluded that the refusal of Keiffer to act as required by law may have deprived the plaintiffs of their liberty without due process of law in violation of the Fourteenth Amendment. If the plaintiffs brought a proper proceeding to secure their liberty before Justice of the Peace Keiffer and he refused to hear their cause, he may be answerable to the plaintiffs in damages. The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken 'under the color' of the law of the state." 151 F. 2d at 250.

But the court there also considered the immunity issue. After acknowledging the absolute judicial immunity which was the rule at common law, Judge Biggs stated,

> "Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'every person.' We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states. . . . But the policy involved is for Congress and not for the court." *Id.* at 250.

We note that defendants in the case before us do not contend that Congress did not have the power to eliminate judicial immunity, but only that it did not in fact do so.

A few years after the *Picking* decision, the Supreme Court for the first time passed on the general scope of these sections of the 1871 Act. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), a member of the California legislature was being sued for statements and acts performed as chairman of a Senate committee. The Court held that Congress could not have meant to go so far as to eliminate legislative immunity: "The limits of §§ 1 and 2 of the 1871 statute — now §§ 43 and 47(3) of Title 8 — were not spelled out in debate. We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U. S. at 376. Interestingly enough, the Court did not refer to the legislative history of the previous Civil Rights Acts, where, as noted above, the liability of state legislators had been discussed and specifically excluded.

In 1966, in *Bauers* v. *Heisel*, 361 F. 2d 581 (3rd Cir. 1966), *cert. denied*, 386 U. S. 1021 (1967), the Third Cir-

cuit, sitting en banc, overruled *Picking* v. *Pennsylvania R. Co., supra,* relying in part on *Tenney,* in part on one of the most complete compilation of cases ever made in this area,[32] and in part on its own reassessment of the policy involved. This brought it into conformity with the rule in this Circuit which has held judges immune from damage suits for acts they did in discharge of their official duties, *e.g., Peckham* v. *Scanlon,* 241 F. 2d 761 (7th Cir. 1957); *Stift* v. *Lynch,* 267 F. 2d 237 (7th Cir. 1959).[33]

The issue was finally put to rest by the Supreme Court in *Pierson* v. *Ray,* 368 U. S. 547 (1967), a crucial case, although not cited by defendants. There a state court judge was sued for damages under 42 U.S.C. § 1983 for his adjudging certain civil rights demonstrators "guilty when their cases came before his court."[34] After discussing the importance of judicial immunity as developed in *Bradley* v. *Fisher, supra,* the Court applied the *Tenney*

32. 361 F. 2d at 586 n. 7.

33. This court has held a sitting judge liable for damages when he acted outside his duty. In *Spires* v. *Bottorff,* 317 F. 2d 273 (7th Cir. 1963), an inmate of a state penitentiary sued a state judge alleging the judge, who had disqualified himself, had persuaded the warden of the penitentiary to try to prevent plaintiff from corresponding with the clerk of the state court regarding his previous conviction. The court held that these allegations stated a cause of action under the Civil Rights Act. Concerning the defense that, since the judge had disqualified himself, he was not acting "under color of state law," the court said,

> "He did not, by disqualifying himself, become any less a judge and without the state authority he had, he could not have been as effective in interfering, as charged, with petitioner's right to an orderly and fair hearing. If the disqualification rendered him immune from overstepping his authority, 'the words "under color of any law" were hardly apt words to express the idea.' *Screws* v. *United States,* 325 U. S. 91, 111 (1944)." 317 F. 2d at 274-275.

34. Subsequently on appeal to the County Court, a trial *de novo* was held as to one of the demonstrators and a directed verdict of acquittal was granted. The cases against the others were then dropped. 386 U. S. at 550.

v. *Brandhove* type of analysis to the situation, finding no specific intent of Congress to abrogate the doctrine.[35] Thus, the Court rejected the position propounded by Mr. Justice Douglas in his dissent that "[t]o most, 'every person' would mean *every person,* not every person *except* judges." *Pierson* v. *Ray,* 336 U. S. at 599 (Douglas, J., dissenting). (Emphasis in original.)

But this, of course, does no more than show why plaintiffs in their complaint did not choose to sue the judge-defendants for money damages. The grant of certiorari in *Pierson* was "to consider whether a local judge is liable for damages under § 1983 for an unconstitutional conviction. . . ." *Id.* at 551. The Court did not consider the issue of immunity from injunctive or other equitable relief. Nor do either of the cases cited by the district court in its memorandum and order in the case before us[36] hold that the sort of relief requested by plaintiffs herein is barred.

The issue of whether or not injunctive relief may be granted under 42 U.S.C. § 1983 in an action against a state judge has been considered by only a few courts. Significantly, in all the cases we have been able to find in which the court seriously considered this question, the gravamen of the offense was a discrimination by state judicial officers against a cognizable class — exactly the

35. "We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all commonlaw immunities. Accordingly, this Court held in *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." 386 U. S. at 554-555.

36. *Brown* v. *Dunne,* 409 F. 2d 341 (7th Cir. 1969), and *Jones* v. *Jones,* 410 F. 2d 365 (7th Cir. 1969), *cert. denied,* 396 U. S. 1013 (1970).

case alleged herein. In *United States* v. *Clark*, 249 F. Supp. 720 (S.D. Ala. 1965), a three-judge court was faced with a claim for injunctive relief against attempts by local officials to interfere with the rights of Negroes to use public accommodations and to register to vote. The United States was the plaintiff pursuant to 42 U.S.C. §§ 1971, 2000a-(a), 2000a-5, seeking a decree which requested in part an injunction to prevent defendants from

> "(a) Arresting, detaining under unreasonable bail, prosecuting, convicting, punishing, or threatening to arrest, detain, prosecute, convict or punish discriminatorily and without just cause any person who is known by defendants to be exercising, seeking to exercise, or to have exercised his right to vote or to use public accommodations free from racial discrimination;
>
> "(b) Requesting, issuing, enforcing, or threatening to enforce any injunction that prevents persons from effectively organizing, meeting or assembling to discuss or advocate the exercise of said rights . . . ." 249 F. Supp. at 722.

The various judicial and quasi-judicial defendants — two judges and the city solicitor — objected on the ground that they were immune from suit. After noting the importance of the doctrine of judicial immunity, the court went on to distinguish it:

> "*However, such a doctrine of judicial immunity applies only when those officials are faced with civil suits for damages in connection with the performance of their official duties.* The doctrine has no application where, as here, the relief is preventive. . . . The principle that no State official — regardless of his position — is immune from having his conduct challenged — in the form of preventive actions — is well established. Cooper v. Aaron, 358 U. S. 1; Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U. S. 713; Sterling v. Constantin, 287 U. S. 378; Bush

> v. Orleans Parish School Board (E.D. La., 1960), 187 F. Supp. 42, aff'd 365 U. S. 569; In re Wallace (M.D. Ala., 1959), 170 F. Supp. 63.
>
> ". . . Such an action involves no interference with judicial discretion since an injunction — if warranted by the evidence and if issued — will only prevent the doing of what there is no right to do. Ex parte Young, 209 U. S. 123, 159." 249 F. Supp. at 727-728. (Emphasis in original.)[37]

In a similar case involving intimidation of Negro citizens who wished to vote, Judge Wisdom, confronting the same sort of problem, drew the distinction between injunctive relief and damages:

> "In Pierson v. Ray, 1967, 386 U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288, the Supreme Court held that judges are immune from liability for *damages* in suits under 42 U.S.C. § 1983. The case does not, of course, mean that they may not be enjoined from pursuing a course of unlawful conduct." *United States v. McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967). (Emphasis in original.)

See also *Phillips* v. *Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968), and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969).[38]

In sum, those courts which have considered the issue have held that when a class-discrimination is alleged,

37. It should be noted that the court did not issue an injunction against Judge Hare, Solicitor McLeod, or Judge Reynolds at that time, due to the considerations of comity and the fact that "the other relief that is to be afforded in this case will make it unnecessary" (249 F. Supp. at 729) to enjoin them. However, jurisdiction was retained over those defendants and thus the holding of the case was that the district court could issue such an injunction.

38. The only case which seems to reject this distinction is *Arensman* v. *Brown*, 430 F. 2d 190 (7th Cir. 1970), which will be considered with those cases discussing prosecutorial immunity, since that was the specific context in which it arose.

judicial officers may be enjoined.[39] Nor is there any statutory block to such an injunction. Even if what plaintiffs request might fall within the rubric of 28 U.S.C. § 2283, which we doubt since they are not asking that any state court proceedings be "stayed," it is now clear that 42 U.S.C. § 1983 is a specific statutory exemption to the prohibition. *Mitchum* v. *Foster, supra.*

Mitchum also reaffirmed the teaching of *Younger* v. *Harris,* 401 U. S. 37 (1971), as to the notions of comity and desire not to enjoin state court criminal prosecutions. Although not raised by defendants we feel a few comments are merited. Here there is a distinct allegation that plaintiffs are being subjected to unequal treatment by the judges because of their race and their civil rights activity. This is an existing, present violation of 42 U.S.C. § 1981, not just a potential violation. Moreover, plaintiffs have not sought to enjoin the state from prosecuting anyone, but merely to enjoin the judges from unconstitutionally fixing bail and sentences. Finally, one important consideration with respect to the irreparable injury suffered by plaintiffs' class in sentencing discrimination, the individual defendant in a criminal case finds it extremely difficult, if not impossible, to obtain review of his sentence as long as it is within the statutory limits. The standard of proof for abuse is very severe. "[I]mposition of sentence is a matter of judicial discretion, and in the absence of a manifest abuse of that discretion it will not be altered by a reviewing court." *People* v. *Bonner,* 37 Ill. 2d 553, 563, 229 N. E. 2d 527 (1967), *cert. denied,* 392 U. S. 910 (1968).

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39. It should be noted that the Supreme Court in a recent construction of 42 U.S.C. § 1985(3), *Griffin* v. *Breckenridge, supra,* 403 U. S. at 102, stated. "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment."

But it is quite possible that a class of plaintiffs will be able to show an invidious discrimination in length of sentences imposed by a given judge, even though all of the sentences may fall within the statutory maximum. Although admittedly a difficult proposition for the plaintiffs to prove, we do not feel that proof is so improbable that the plaintiffs should be denied a chance to establish their allegations.[40] For the reasons expressed above, we consider that *Younger* does not control this sort of case, and if it does that the plaintiffs' allegations are sufficient to come within the "exceptional circumstances" test outlined therein:

> "where irreparable injury is 'both great and immediate,' 401 U. S., at 46, where the state law is 'flagrantly and patently violative of express constitutional prohibitions,' 401 U. S., at 53, or where there is a showing of 'bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief.' 401 U. S., at 54." *Mitchum* v. *Foster*, *supra*, 40 U.S.L.W. at 4738.

Since the immunity, often characterized as "quasi-judicial," cloaking the prosecuting attorney is, of necessity, derivative from the concepts developed in connection with the judiciary, the conclusions we have reached in the parent would seem to be dispositive of the offspring. Nevertheless, because of cases treating the matter from the viewpoint of the prosecuting attorney, we do separately address ourselves to that phase of the present case. An early mention of "quasi-judicial" immunity is found in *Yaselli* v. *Goff*, 12 F. 2d 396 (2nd Cir. 1926), *aff'd per curiam (mem.)*, 275 U. S. 503 (1927), an action brought against a special assistant to the Attorney Gen-

40. Similar difficult fact questions are placed before district judges in many different contexts, *e.g.*, the proof of intent where it is appropriate to an offense charged. The fact that questions are difficult, and may require proof by inference, should not be a basis for dismissal.

eral for malicious prosecution. The court chose to extend the immunity offered to judicial officers in the exercise of their duties to these quasi-judicial officers.[41]

Cases from this Circuit have uniformly held that an action for damages would not lie against a prosecutor who was performing his duties, no matter what malice was alleged. The earliest case in this Circuit considering the question is *Cawley* v. *Warren*, 216 F. 2d 74 (7th Cir. 1954), in which plaintiff sued the state's attorney, his first assistant, and the foreman of a grand jury for allegedly wrongfully procuring indictments against him. The action was brought under 42 U.S.C. § 1985, and the court, without reference to the legislative history, or even any reference to the words of the statute, stated, "[t]he law supports this claim of immunity. It extends to and includes judges, prosecuting attorneys and members of a grand jury." 216 F. 2d at 75.[42]

As noted in the first portion of this opinion, the legislative history of the various Civil Rights Acts makes a strong case for the view that Congress intended to hold prosecutors liable, even for damages, when they discriminated against classes of citizens. Be that as it may, this court has followed its opinion in *Cawley* in numerous other cases, *e.g.*, *Stift* v. *Lynch*, 267 F. 2d 237 (7th Cir. 1959), and *Phillips* v. *Nash*, 311 F. 2d 513 (7th Cir. 1962),

41. "A United States attorney, if not a judicial officer, is at least a quasi judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him." 12 F. 2d at 404.

42. The court did add the following comment:

"While we can understand from the facts set forth in plaintiff's complaint her outraged feeling resulting from the charged acts of the defendants, the rule enunciated in the foregoing cases is that, as a matter of public policy, such an injured person is without relief in a civil proceeding." 216 F. 2d at 76-77.

cert. denied, 374 U. S. 809 (1963) (a case which followed shortly after the Supreme Court had opened up the field of damage suits for deprivation of civil rights by reversing this Circuit in *Monroe* v. *Pape, supra*). Nor is this Circuit the only one to adopt such a rule. In fact every circuit which has considered the question seems to have reached the same result.[43]

In many of these cases the court reached this result in a summary manner. Our discussion of the relevant legislative history and the words of the statute themselves reflect our belief that there is not freedom from doubt on this issue. However, the Supreme Court's opinion in *Pierson* v. *Ray, supra*, must control. In essence, it seems that prosecutors are closer to the judge in *Pierson* than to the policeman in *Monroe* v. *Pape, supra*. We therefore hold that insofar as defendant Berbling was acting within his prosecutorial function he has a quasi-judicial immunity from suit for damages under the Civil Rights Acts.

Two more issues remain with respect to Berbling and Shepherd: first, the scope of this quasi-judicial immunity, and, second, the availability of injunctive relief. Insofar as Berbling and Shepherd are not acting within the scope of prosecutorial discretion they are not covered by the above cases absolving them from liability for damages. The duties of the State's attorney are set out in the Illinois Revised Statutes, ch. 14, § 5 (1971).[44] They include:

43. *Fanale* v. *Sheehy*, 385 F. 2d 866 (2nd Cir. 1967); *Dacey* v. *New York County Lawyers' Association*, 423 F. 2d 188 (2nd Cir. 1969), *cert. denied*, 398 U. S. 929 (1970); *Bauers* v. *Heisel, supra*; *United States ex rel. Rauch* v. *Deutsch*, 456 F. 2d 1301 (3rd Cir. 1972); *Guedry* v. *Ford*, 431 F. 2d 660 (5th Cir. 1970); *Madison* v. *Gerstein*, 440 F. 2d 338 (5th Cir. 1971); *Hurlburt* v. *Graham*, 323 F. 2d 723 (6th Cir. 1963); *Rhodes* v. *Meyer*, 334 F. 2d 709 (8th Cir. 1964); *cert. denied*, 379 U. S. 915; *Clark* v. *State of Washington*, 366 F. 2d 678 (9th Cir. 1966); *Ney* v. *State of California*, 439 F. 2d 1285 (9th Cir. 1971); *Kostal* v. *Stoner*, 292 F. 2d 492 (10th Cir. 1961), *cert. denied*, 369 U. S. 868 (1962).

44. This section was amended effective August 24, 1971, by P. A. 77-1244, § 1, but the change was immaterial, dealing only with form and so the citation is to the current law.

> "(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned."

Nowhere is there any mention of the State's attorney having as one of his "quasi-judicial" duties the investigation of crimes, which is primarily a police function. It has long been established that police officers have no immunity from civil liability under 42 U.S.C. § 1983, *Monroe* v. *Pape, supra.* It would be anomalous if the State's attorney's quasi-judicial immunity carried over to situations in which he was acting as a police investigator rather than in his quasi-judicial role.[45]

Two other circuits have considered this issue and have reached the same result. In *Lewis* v. *Brautigam,* 227 F. 2d 124 (5th Cir. 1955), the state's attorney was alleged to have ordered deputies to force plaintiff to pose for photographs showing him in convict garb at a state prison and also to plead guilty. The court found it unnecessary to inquire into the nature of the quasi-judicial immunity "further than to say that a quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office." 227 F. 2d at 129.

Similarly in *Robichaud* v. *Roman,* 351 F. 2d 533 (9th Cir. 1965), plaintiff alleged that the county attorney had directed certain police activity designed to coerce and intimidate her into making a confession. The court reversed the dismissal with some words that we find applicable to the present case:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-

45. For a case holding a judge liable for acts outside his judicial duties, see *Spires* v. *Bottorff,* 317 F. 2d 273 (7th Cir. 1963), discussed above at n. 33.

judicial capacity, then the reason for his immunity — integral relationship between his acts and the judicial process — ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? . . .

"The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process." 351 F. 2d at 536, 537-538.

The court did not attempt to distinguish which acts might have been committed after the county attorney had abandoned his quasi-judicial role, but remanded to the district court to make such a determination.

In the case before us, the allegations in the complaint may not be sufficiently removed from judicial (or quasi-judicial) activity, such as evaluation for prosecutorial purposes, to warrant removing the cloak of immunity from them, but this was not considered by the district court. The better course therefore is to remand to allow plaintiffs to clarify their complaint by amendment and give the district court a chance to reconsider in the light of the views expressed herein.

The second unanswered question is whether the State's attorney is subject to injunctive proscription. Since *Ex parte Young*, 209 U. S. 123 (1908), it has been clear that a federal court has the power to enjoin a state prosecutor from instituting criminal proceedings under a state statute. Even earlier than *Young*, lower courts had recognized that such a power existed. *M. Schandler Bottling Co.* v. *Welch*, 42 Fed. 561 (C.C. Kan. 1890). Moreover, in *Mitchum* v. *Foster, supra*, the Supreme Court has recently affirmed that 42 U.S.C. § 1983 is an express statutory exception to 28 U.S.C. § 2283.

In light of the above cases, we come to the case of *Arensman* v. *Brown*, 430 F. 2d 190 (7th Cir. 1970), in which the court held that quasi-judicial immunity forbids a request for an injunction against a prosecutor from prosecuting a criminal cause of action against the plaintiff. We read *Arensman* as being confined to its facts, noting that the court stated "we think the case borders on the frivolous," 430 F. 2d at 191. Also there was no allegation that plaintiff's rights could not be adequately vindicated at a criminal proceeding nor any other allegation that might exclude it from the guidelines set down in *Younger* v. *Harris, supra.* We hold that the quasi-judicial immunity does not extend to complete freedom from injunction.

Although defendants did not raise the issue in their brief, we find it necessary to treat the consideration raised in *Peek* v. *Mitchell*, 419 F. 2d 575 (6th Cir. 1970), where the court denied a similar affirmative injunction to require prosecution. That case highlights the difference between an injunction forbidding prosecution and one compelling prosecution, which are admittedly based on different considerations. In *Peek*, plaintiffs sought to compel federal and state officials to prosecute two Detroit policemen who allegedly committed violations of plaintiffs' civil rights during the Poor People's Campaign on May 13, 1968. Initially the court rejected the contention that defendants had a total immunity from injunction, but added,

> "It is likewise apparent that the federal courts must achieve a balance between the protection of individual rights and the freedom of public officials to exercise their necessary expertise in performing their duties. This is an era of increased litigation involving alleged civil rights violations, and the courts must shield the responsible public officials against any abusive use of the civil rights legislation." 419 F. 2d at 578.

In denying injunctive relief, the court rejected the plaintiffs' contention that there was a " 'systematic pattern' of conduct," and held

> "We find that based on this record, the Prosecuting Attorney is immune from the types of relief sought here. Defendant's statutorily imposed obligations, which include investigation, were performed in the good-faith exercise of his discretion as prosecuting attorney and within the scope of his authority. *We find no arbitrary or discriminatory action which would prompt substitution of our judgment for his.*" 419 F. 2d at 578-579. (Citation omitted. Emphasis added.)

Similarly, it was recently stated, "It is hardly necessary to add that the doctrine of prosecutorial discretion has never insulated conduct from review on charges of bad faith, fraud, or illegality." *Boyd* v. *United States*, 41 U.S.L.W. 2005, 2006 (E.D. N.Y., June 7, 1972).

Plaintiffs in the present case have alleged that prerequisite for injunctive relief which the Sixth Circuit in *Peek* found lacking. Plaintiffs have alleged that the State's attorney handles complaints and prosecutes cases in a blatantly discriminatory and arbitrary manner.[46]

This is not a case in which it can be said that there is an adequate remedy at law and therefore there is no proper basis for equitable relief. Theoretically, plaintiffs now have an action for damages under 42 U.S.C. § 1985(3) against the private parties who have been assaulting

46. That the prosecutor's power is great was recognized over 40 years ago by the Wickersham Commission:

> "The prosecutor [is] the real arbiter of what laws shall be enforced and against whom, while the attention of the public is drawn rather to the small percentage of offenders who go through the courts." National Commission on Law Observance and Enforcement: No. 4, Report on Prosecution, p. 19 (1931), quoted in Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U. L. Rev. 174, 175 (1965).

them.[47] We, however, would retund credulity to say that a private action of that sort is the equivalent of prompt and effective prosecution under the criminal laws. At least one of the principal reasons for criminal laws is their deterrent effect on similar conduct by others. While, in some instances, the private damage action may have deterring effects, it seems unlikely it will obviate the necessity for a system of criminal justice. The type of discriminatory conduct here alleged will not be, in our opinion, deterred by the possibility of piecemeal after-the-fact damage suits.

We conclude that plaintiffs' remedy at law is plainly inadequate and equitable relief is proper. In addition, the above consideration shows the "great and immediate" irreparable injury being suffered by plaintiffs to justify intervention under *Younger* v. *Harris, supra,* 401 U.S. at 46.

As to defendants' repeated references to the fact that we are dealing with an area of discretion, we need only note the words of Chief Justice Marshall:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." *Osborn* v. *United States Bank,* 9 Wheat. (22 U. S.) 738, 866 (1824). (Emphasis added.)

The word discretion is limited by the duty to follow the law and such a blanket pattern of discrimination as is here alleged cannot be said to conform to such a duty.

47. Since *Griffin* v. *Breckenridge, supra,* overruled *Collins* v. *Hardyman,* 341 U. S. 651 (1951).

A discretionary action is subject to review and reversal for abuse of discretion. "And by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable." *United States* v. *McWilliams,* 163 F. 2d 695, 697 (D.C. Cir. 1947). For us to find that the acts and failures to act alleged in the complaint do not constitute an abuse of discretion, we would have to say that they do not constitute "arbitrary action," *Burns* v. *United States,* 287 U. S. 216, 223 (1932), and this we can only do by ignoring the mandates of equal protection of the laws.

The principal reasons presented for various types of immunity have been capably summarized:

> "(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce the honesty and efficiency of public officers." Note, *The Proper Scope of the Civil Rights Acts,* 66 Harv. L. Rev. 1285, 1295 n. 54 (1953).

Numbers (1), (2) and (4) would seem to apply only to civil actions for damages and not to injunctive relief which we have approved herein. Reason number (3) is a serious consideration—a prosecutor's time is necessarily limited —but since we approve not a case brought by a single disappointed complainant, but rather one brought by an entire class of citizens of Cairo, Illinois, the number of such suits charging discrimination against classes of citizens is not predictably substantial nor is their merit predictably insubstantial. Moreover, as to both (3) and (5) the duty owed to the public is primary and that duty is

an even-handed, nondiscriminatory enforcement of the laws, not a vindication of an individual's complaint; it is that public duty which plaintiffs seek to enforce. Finally, as to (6), defendants have not argued, either before this court or in the district court, that there is a requirement of exhaustion of state legal or political remedies, an argument which we would reject in the light of *Carter* v. *Stanton*, 405 U. S. 669 (1972), no matter how potentially adequate those remedies might appear to be.

Nor could we find such political remedies adequate. Cairo, Illinois, has admittedly been the scene of substantial civil rights agitation for the last several years. Not surprisingly there has been a polarization of the community, and, in such a case, it would be totally presumptuous of this court to find that the ballot provides even a probability of remedying the alleged oppression of the minority by the duly elected representatives of the majority. It was, in fact, just such oppression which caused the Congress to enact the provisions with which we now deal.[48] In summary, considering all of the generally accepted reasons for granting immunity to state officials, we conclude that none is applicable here, especially in light of the corrosive impact the alleged conduct has had on the equal handed application of the criminal justice system.

Nor do we find various alternative remedies sufficiently useful for us to deny the relief sought by plaintiffs. As to any direct remedy by criminal prosecution for official misconduct by the defendants, suggested by, *e.g.*, Note, *Nonfeasance: A Threat to the Prosecutors' Discretion*, 30 Ind. L. J. 74 (1954), we think the following correctly puts the matter:

> "Such remedies are merely nominal. The criminal sanctions can rarely be invoked to control the errant

48. See discussion of legislative history, *supra*, especially pp. 15-17.

police officer, the errant prosecutor, and never the oppressive judge. The civil damage suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character." Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 434 (1960).

Nor is there any possibility of private enforcement of criminal laws[49] since Illinois has not provided for such actions by statute.[50]

Finally, we need only note the potentially egregious results of denying relief in this case if the allegations are true. The Constitution prescribes through the Fourteenth Amendment that the states must apply their laws equally. This view was adopted by the Supreme Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374 (1886):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

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49. "A system of private prosecution can be justified in terms of both society's interest in increased law enforcement and the individual's interest in vindication of personal grievances. Full participation by the citizen as a private prosecutor is needed to cope with the serious threat to society posed by the district attorney's improper action and inaction. This rationale alone is adequate to support private prosecution." Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 227 (1955).

50. Although private prosecutors may assist the State's attorney, the Illinois Supreme Court has stated "the State's attorney, as a public officer, must have the direction and assume the responsibility of the prosecution. It would be manifestly improper to permit counsel paid by private parties to supplant the constituted officer of the law and to assume the management of the case. . . ." *Hayner* v. *People*, 213 Ill. 142, 147, 72 N. E. 792 (1904).

Few courts have applied *Yick Wo* to substantial criminal prosecutions, perhaps because of a failure of proof by various criminal defendants of such invidious discrimination and perhaps from a desire by courts to avoid freeing criminals. Yet, "when the claim of discriminatory enforcement is raised in an injunction proceeding, it is not as obvious that recognition of the claim will result in freeing a possible criminal, since an injunction can be limited to enjoin only discriminatory enforcement rather than all enforcement." Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws,* 61 Colum. L. Rev. 1103, 1109 n. 25 (1961). We feel that the injunctive remedy proposed by plaintiffs if their case be proved on hearing must be found preferable to a holding that the criminal laws cannot be enforced against blacks who assault whites so long as whites are not being punished for assaults on blacks.

Moreover, considering the lack of alternative remedies, if the federal courts should say to these plaintiffs, after having stripped the Civil Rights Acts of their damage remedy by invoking the concept of judicial immunity, that there is no injunctive relief available, then our system of government of law and not of men will be subject to question. As Judge Cummings said in *Stamler* v. *Willis,* 415 F. 2d 1365, 1369-1370 (7th Cir. 1969), "[t]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of Government."

Our focus has been primarily on the judicial immunity of the judge defendants and the quasi-judicial immunity of the State's attorney defendant. It obviously follows from what we have said that Shepherd, the investigator, would not be entitled to immunity in any event from injunction and, in all probability, not from a civil rights action for damages. While the district court spread Berb-

ling's supposed mantle around Shepherd, we note that the investigator from the complaint might seem to border more in the nature of a policeman-detective than one entitled to the protective quasi-judicial immunity from damage actions. We do not need to decide this issue now as the proof on a trial should establish his status with greater exactitude than we are able to do on the record before us.

Obviously, since this case is before us on a motion to dismiss, it would be improper for us to attempt to spell out in detail any relief the district court might grant if the plaintiffs can prove what they allege.[51] Nevertheless, as this appears to be a case of first impression as to the type of relief approved, we feel obligated to give the district court some guidelines as to what type of remedy might be imposed. We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's attorney. An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints. Nevertheless, we have complete confidence in the district court's ability to set up further guides as required[52] and if necessary to consider individual decisions.[53] Difficulty of formulating a remedy if a complaint is proved following a trial cannot be grounds for dismissing the complaint *ab initio*. We cannot so easily belittle the powers of a court of equity nor the ability of district judges who have grappled with difficult remedies before, *e.g.*, school desegregation orders, railroad reorganizations.

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51. For examples of the way in which such proof might be made see Comment, *supra*, 61 COLUM. L. REV. at 1122-1131.

52. *E.g.*, Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971).

53. *Id.* at 45-49 discussing *Regina* v. *Commissioner of Police ex rel. Blackburn* [1968], 1 Q. B. 118.

We also are not unmindful of the possibility of a substantial additional burden being placed on the federal judiciary by our decision. However, if it can be alleged and proved, and the sweep of our decision is to be no broader, that the state officials consistently, designedly and egregiously have, under color of law, deprived an entire group of citizens of their civil rights, then the additional burden will necessarily have to be assumed. The civil rights of all persons, too often merely words in a constitutionally inspired century old statute, deserve no lesser implementation than here accorded them.

Further, in response to the final rhetoric of the dissent, we reemphasize that we have no intent of suggesting that the allegations of the complaint are true. Certainly we have not intended any intimation that corruption exists on the part of the accused officials. We have only said that if the allegations are true, and the burden of proving truth is on the plaintiffs, then a federal cause of action has been stated.

For the reasons set out hereinbefore, we reverse and remand for further proceedings not inconsistent herewith. The case shall be reassigned to a different district judge.

REVERSED and REMANDED.

DILLIN, *District Judge*, dissenting.

The majority holds, for the first time, that a federal district court has the power to supervise and to regulate by mandatory injunction the discretion which state court judges and state's attorneys may exercise within the limits of the powers vested in them by law. I respectfully suggest that no such power exists.

It is true, as a generality, that the immunity doctrine which protects such judicial and quasi-judicial officials against damage actions does not preclude the granting of equitable relief against them. *Jacobson* v. *Schaefer*, 441 F.2d 127 (7 Cir. 1971). However, in the cases cited by the majority[1] in which this doctrine has been applied, the equitable relief granted has invariably been in the form of a prohibitory injunction, confining such officials to the limits of their legal authority. There is a great difference between ordering an official not to do a particular act, measurable by objective standards, and in ordering him to exercise his discretion in a certain general way, measurable only by subjective standards.

Many pages of the majority opinion are devoted to an argument, derived from the legislative history of the Civil Rights Acts, to the effect that it was the congressional purpose that there should be no exceptions to the apparently all inclusive wording of those Acts. However much I might agree if the case were the first to interpret that legislation, the fact remains that those same arguments have been eloquently expressed and the same his-

1. *Ex parte Young*, 209 U. S. 123 (1908); *United States* v. *McLeod*, 385 F. 2d 734 (5 Cir. 1967); *United States* v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965); *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968); *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (M. D. Fla. 1969). Cf. *Dombroski* v. *Pfister*, 380 U. S. 479 (1965); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Ex parte Virginia*, 100 U. S. 339 (1880).

tory reviewed by Mr. Justice Douglas in his dissenting opinions in cases similar to ours, and have been found wanting. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Greenwood* v. *Peacock*, 384 U.S. 808 (1966).

Greenwood v. *Peacock, supra*, is particularly instructive here. That case involved the question of whether another of the Civil Rights Acts, 28 U.S.C. § 1443(1),[2] permits removal of a criminal case from state to federal court when a state statute, although valid and nondiscriminatory on its face, is applied in a discriminatory fashion, for racial reasons, in violation of the equal rights of the accused. The Fifth Circuit held in the affirmative,[3] in disregard of a long line of cases beginning with *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), and ending with *Kentucky* v. *Powers*, 201 U.S. 1 (1906). The Fifth Circuit was reversed, the Court holding with reference to such previous cases, after considering the question anew, as follows:

> "Those cases all stand for at least one basic proposition: It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be 'denied or

2. § 1443. "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . ."

3. *Peacock* v. *City of Greenwood*, 347 F. 2d 679 (1965).

cannot enforce in the courts' of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel*, 384 US 780; *Strauder* v. *West Virginia*, 100 US 303." 384 U. S. at 827-28.

The situation presented in *Greenwood* and the situation alleged in the complaint here are, for all practical purposes, identical. In that case it was alleged, as a basis for removal of criminal actions brought against black defendants in a state court, that the local officialdom was applying statutes, valid on their face, in a racially discriminatory manner to deny defendants of their civil rights. In this case, the same kind of discriminatory conduct is alleged: that the officials apply the criminal laws harshly to blacks, and lightly, if at all, to whites. In *Greenwood*, recognition of the right to remove under the circumstances outlined would have required the federal district court, in each instance where removal had been taken and a petition for remand filed, to conduct an evidentiary hearing to determine whether a pattern of discrimination existed. In addition to placing an intolerable burden upon the federal courts, such an interpretation of § 1443(1), it was said, would have operated to work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of criminal law. Such was not the intent of the Congress, the majority concluded.

If, as the Court said in *Greenwood*, it was not the intent of Congress that § 1443(1) be applied as contended by

the State court defendants, *a fortiori* it could not have been intended that "a wholesale dislocation of the historic relationship between the state and federal courts in the administration of criminal law" be accomplished by enabling federal trial courts to "put their brethren of the state judiciary on trial," as the majority would do in cases such as the one before us.

In the *Greenwood* situation, had the Court ruled the other way, the duties of the federal trial court would be at an end once it had concluded the required hearing. The Court would either find no pattern of discrimination, and remand the case, or it would find such a pattern and either dismiss or try the case, as the circumstances warranted. In the case at hand, however, the federal court's task would be never ending, assuming that plaintiffs could make their case. The court would first need to conduct an evidentiary hearing to determine whether a pattern of discrimination could indeed be discerned; if so, it would presumably order the state's attorney to cease discriminating. Within the context of the complaint, this would mean not only that he should not ask for disproportionately high penalties against blacks, but that he should do a more vigorous job of investigating and filing charges made by blacks against whites, and try harder to obtain convictions in such cases as might be filed. Enforcement would necessarily be by contempt proceedings, which would require continuing hearings ad infinitum to examine the subjective motivation of the state's attorney in performing, or in allegedly failing to perform, his discretionary duties. For example, if the charge was made, and found to be true, that he failed to do his best to convict a white, who was acquitted, the defendant would remain free for double jeopardy reasons, but the prosecutor would go to jail. Similarly, a judge operating under a nebulous order not to discriminate in fixing bonds and in sentencing

would thereafter be confronted with the possibility of a contempt citation and the necessity to defend his motivation in each instance when he performed either function to the dissatisfaction of a minority race defendant.

Nor is this the only difficulty with the majority's position. The principal complaint against the state's attorney is that he will not prosecute whites: therefore, he should be compelled to do so. But it was held in the Confiscation Cases, 74 U.S. (7 Wall) 454 (1868), that whether or not prosecution is to be instituted, or whether a *nolle prosequi* it to be filed in a pending action, is wholly within the discretion of the official in the executive branch of the government cloaked with such power. The functions of prosecutor and judge are incompatible, and the right in the executive branch to prosecute or not to prosecute is not subject to control by judicial discretion. *Ex parte United States*, 287 U.S. 241 (1932); *United States* v. *Thompson*, 251 U.S. 407 (1920); *Peek* v. *Mitchell*, 419 F.2d 575 (6 Cir. 1970); *United States* v. *Cox*, 342 F.2d 167 (5 Cir. 1965), *cert. den.* 381 U.S. 985; *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. den.* 384 U.S. 906 (1966); *Goldberg* v. *Hoffman*, 225 F.2d 463 (7 Cir. 1955); *United States* v. *Brokaw*, 60 F.Supp. 100 (S.D. Ill. 1945). Cf. *Clark* v. *State of Washington*, 366 F.2d 678 (9 Cir. 1966).

Upon the analogy to *Greenwood*, the additional reasons just stated, as well as upon application of the principles of "Our Federalism," as expounded in *Younger* v. *Harris*, 401 U.S. 37 (1971), and its companion cases,[4] I would affirm dismissal of the injunctive claims, claims one and six of the amended complaint, for failure to state a claim upon which relief could be granted. Rule 12(b)(6), Federal Rules of Civil Procedure.

4. *Samuels* v. *Mackell*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Perez* v. *Ledesma*, 401 U.S. 82; *Dyson* v. *Stein*, 401 U.S. 200; *Byrne* v. *Karalexis*, 401 U.S. 216.

I likewise disagree with the majority's action in reversing dismissal of the damage claims asserted against the state's attorney and his investigator in claims two, three, and four. The majority rather grudgingly concedes that all federal courts, including this one, hold that the immunity doctrine protects state's attorneys from damage actions arising out of the discharge of official duties, but suggests, without deciding, that perhaps investigation of charges of crime may not be a prosecutorial function and, again perhaps, some liability might lie in this area if only plaintiffs would redraft their complaint to plead something actionable.

First of all, I think that the amended complaint must stand or fall as drafted, particularly since the majority has elected to treat the lower court's dismissal as one for failure to state facts. The pleading, although lengthy, does not contain the rambling gibberish typical of a *pro se* complaint—a situation which frequently causes courts of review to search carefully for an actionable theory, inexpertly expressed—but to the contrary is expertly drafted by counsel who are obviously quite competent. The question, therefore, is as to whether the amended complaint states any facts at all upon which relief could be granted, and having to do with investigation. I find none.

The charge is not that the prosecutor and his investigator have overinvestigated—have applied undue pressure to obtain convictions of blacks, or have otherwise overreached, as in the two cases cited by the majority.[5] Rather, the charge is that they have not done enough in that they have *failed* to investigate charges by blacks against whites, and have *failed* to permit the filing of certain complaints. In other words, the charge is of nonfeasance or misfeasance in the discharge of the prosecutor's official

5. *Robichaud* v. *Ronan*, 351 F.2d 533 (9 Cir. 1965); *Lewis* v. *Brautigam*, 227 F.2d 124 (5 Cir. 1955).

duty to "commence and prosecute all actions . . . in which the people of the State or county may be concerned."[6]

Thus, as a matter of logic, we are down to this: if investigation is a function of the state's attorney's office, then the complaint must fail because of the immunity doctrine. If it is not, then the complaint is equally bad, since the state's attorney can hardly be held liable for *failure* to perform a task he is not required to do. Finally, it has been expressly held that failure to investigate alleged criminal conduct is clearly privileged as in the exercise of official, quasi-judicial functions. *Scolnick* v. *Winston*, 219 F.Supp. 836 (S.D. N.Y. 1963), *aff'd* 329 F.2d 716 (2 Cir. 1964). The amended complaint alleges no more against the investigator than against his superior, and must fail for the same reasons.

The rationale for the rule of immunity from damage actions was well expressed by Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F.2d 579 (2 Cir. 1949), as follows:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the

6. Ill. Rev. Stat. 1971, Ch. 14, § 5, as amended.

wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." 177 F.2d at 581.

I submit that the reason for the rule against damage actions applies with equal force to mandatory injunctions which seek to regulate the exercise of discretion of judicial[7] and quasi-judicial officers. It would be cold comfort for such an official to be told by this Court: "Be of good cheer! We will protect your pocketbook, even as we send you to jail."

I would affirm the judgment of the lower court in its entirety.

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7. If corruption indeed exists in the Illinois judiciary, then that State should clean its own house. Ample procedures exist for accomplishing this end, which can be set in motion by concerned citizens such as plaintiffs. Constitution of Illinois (1970), Art. 6, § 15.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Illinois

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his Father and Next Friend, HOBART LAMBERT, MORRIS GARRETT, by his Father and Next Friend, LEVI GARRETT, individually and as representatives of a class,

Plaintiffs,

vs.

PEYTON BERBLING, individually and as State's Attorney for Alexander County, Illinois, EARL SHEPHERD, individually and as investigator for Peyton Berbling, CARL MEISENHEIMER, as Police Commissioner of the City of Cairo, Illinois, MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois, and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Defendants.

Civil No. 70-103

JUERGENS, *Chief Judge.*

MEMORANDUM AND ORDER

Plaintiffs bring this civil rights action against, among others, Peyton Berbling, individually and as State's Attorney for Alexander County, Illinois, Earl Shepherd, in-

dividually and as investigator for Peyton Berbling, Michael O'Shea, as Magistrate of the Circuit Court for Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois.

By asking this Court to enjoin the acts of the elective county officials, plaintiffs seek to have this Court sit as a court of review over the acts and actions of the duly elected officials of Alexander County, namely, the associate circuit judge, the magistrate, the state's attorney and the assistant to the state's attorney. What plaintiffs seek in their request for injunctive relief is merely to have this Court submit its judgment for the judgment of the above-named elected officials of Alexander County. Under the circumstances here presented, the Court does not have jurisdiction to entertain such a cause.

Plaintiffs cite cases in which federal courts have enjoined acts of elective state officials under certain circumstances, not here present. However, in none of the cases cited have the federal courts been granted power to substitute their judgment for that of the elected state officials. The matters complained of in the amended complaint as against the above-named elective officials are at most discretionary acts on their part.

Accordingly, that portion of the complaint seeking injunctive relief against the associate circuit judge, magistrate, state's attorney and assistant to the state's attorney will be dismissed for failure of jurisdiction in this Court.

Defendants Peyton Berbling and Earl Shepherd, so called in the complaint (properly Earl A. Shepherd, Jr.), move to dismiss the complaint, alleging that the complaint fails to state a cause of action against them under the claim of judicial immunity.

Defendants Michael O'Shea and Dorothy Spomer also move to dismiss on the basis of judicial immunity.

The motion of the magistrate and judge will be first considered.

Michael O'Shea is a Magistrate of and Dorothy Spomer is an Associate Circuit Judge of Alexander County, Illinois. The factual allegations upon which this complaint is based arise out of the alleged acts of these two named judicial officials while acting in the course of their judicial functions.

Judicial officers are immune from liability for damages for acts committed within their judicial jurisdiction. As was stated in Pierson v. Ray, 386 U.S. 547, 553, 554:

> "* * * Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' "

The immunity of judges from liability in the regular performance of their judicial duties under 42 U.S.C. § 1893 (sic) is well established and finds its root in the common law. Jones v. Jones, 410 F.2d 365 (7th Cir., 1969).

Judges, magistrates and clerks of the court are immune from liability for acts done in performance of their duties. Brown v. Dunne, 409 F.2d 341 (7th Cir., 1969).

The motion of the Magistrate, Michael O'Shea, and of the Associate Judge, Dorothy Spomer, is well taken and the complaint and cause of action should be and the same is hereby dismissed as to these two named defendants.

Peyton Berbling is the State's Attorney of Alexander County, Illinois, and Earl A. Shepherd, Jr., is investigator for the State's Attorney.

Affidavits attached to these two defendants' motion to dismiss establish that Earl A. Shepherd, Jr. (referred to in the complaint as Earl Shepherd) is not a lawyer and is not an assistant state's attorney, but is a salaried employee acting under the office of the State's Attorney. His duties consist solely of making investigations of cases for the State's Attorney. He talks to witnesses and takes statements and presents them to the State's Attorney and otherwise offers assistance to the State's Attorney in carrying out investigative functions of the office. As such employee, he is not entitled to and makes no decisions as to any type of trial or non-trial and serves only as an investigator and assistant to the State's Attorney.

As was stated in Agnew v. Moody, 330 F.2d 868, 869 (9th Cir., 1964):

> "We have repeatedly held that judges and 'quasi-judicial' officers, including prosecuting attorneys, are immune from suit under the Civil Rights Act for conduct in the performance of their official duties. * * *."

It is well settled that the state's attorney is entitled to immunity from claims for damages arising out of his judicial and quasi-judicial acts. Kalec v. Adamowski, 406 F.2d 536 (7th Cir., 1969).

In Byrne v. Kysar, 347 F.2d 734 (7th Cir., 1965), it was held that a medical commission appointed by the county board to examine a person as to his mental condition shared the court's judicial immunity in performance of their quasi-judicial function and were not subject to suit under the Civil Rights Act provision making liable persons under the Civil Rights Act. In Byrne it was also stated that an assistant state's attorney, acting in his official capacity as prosecutor for the state, is also afforded the same protection given a judge.

While defendant Shepherd was not acting in the capacity of an assistant state's attorney, he was acting as an as-

sistant to and acting for the state's attorney and pursuant to the authority and under the direction of the state's attorney. As such he would be entitled to the same judicial immunity which extends to the state's attorney insofar as his acts were performed in the furtherance of the official duties assigned to him for performance by the state's attorney. The allegations of the compliant with regard to the defendant Shepherd show that the acts complained of were taken in the performance of the duties assigned to him by the state's attorney and as such enjoy the same immunity afforded to the other judicial or quasi-judicial officials.

The motion to dismiss of defendants Peyton Berbling and Earl A. Shepherd, Jr., (Earl Shepherd) be and the same is hereby allowed and the complaint and cause of action is dismissed as to these two defendants.

/s/ WILLIAM G. JUERGENS
Chief Judge

Dated: March 23, 1971

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R.S. § 1977.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
R.S. § 1978.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place

of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either

directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

Supreme Court, U. S.
FILED
MAY 18 1973
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-953

MICHAEL O' SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,

Petitioners,

vs.

EZELL LITTLETON, ET AL.

No. 72-955

W. C. SPOMER, ET AL.,

vs.

EZELL LITTLETON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 3, 1973
CERTIORARI GRANTED APRIL 2, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-953

MICHAEL O' SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,

Petitioners,

vs.

EZELL LITTLETON, ET AL.

No. 72-955

W. C. SPOMER, ET AL.,

vs.

EZELL LITTLETON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 23, 1970—Plaintiffs' Verified Complaint filed in U. S. District Court for the Eastern District of Illinois.

August 25, 1970—Defendants' motion to strike complaint and to dismiss cause (O'Shea and Spomer).

September 14, 1970—Defendant's motion to dismiss or in the alternative motion to strike (Berbling—now succeeded by W. C. Spomer).

October 8, 1970—Plaintiffs' motion for leave to file Amended Complaint.

October 8, 1970—Order granting plaintiffs' motion to file Amended Complaint.

October 29, 1970—Defendants' motion to dismiss or in the alternative motion to strike Amended Complaint (Berbling and Shepherd).

November 10, 1970—Defendants' election to stand on motion to strike complaint and dismiss cause. (O'Shea and Spomer).

March 23, 1971—Memorandum and Order of the District Court for the Eastern District of Illinois.

April 15, 1971—Plaintiffs' notice of appeal to Seventh Circuit.

October 6, 1972—Opinion and judgment Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed July 23, 1970

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, LEROY LAMBERT, by his Father and Next Friend, HOBERT LAMBERT, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

PEYTON BERBLING, individually and as States Attorney for Alexander County, Illinois, CARL MEISENHEIMER, as Police Commissioner of the City of Cairo, Illinois, ROY BURKE, as Chief of Police of the City of Cairo, Illinois, MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois, DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Defendants.

Civil Action
No. 70-103

Equitable Relief
Requested

VERIFIED COMPLAINT

1. This is a civil action under Title 42 U. S. C. sections 1983, 1985 and 1986, for damages and for a preliminary and permanent injunction and other equitable relief, to enjoin the deprivation, under color of law, custom and usage of Alexander County and the City of Cairo, Illinois, of plaintiffs and members of their class rights, privileges and immunities guaranteed by the First, Sixth, Eighth, Thir-

teenth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U. S. C. sections 1983, 1985 and 1986.

2. Jurisdiction is conferred on this Court by Title 28 U. S. C. sections 1331 and 1343(3) and (4). The amount in controversy exceeds ten thousand dollars.

3(a). Plaintiffs are black citizens of the City of Cairo, Alexander County, the State of Illinois and United States, with the exception of plaintiff Harris and Brown, who are white citizens of the City of Cairo, Alexander County, the State of Illinois and the United States.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated.

(c) The class includes all those who, on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

4(a). Plaintiffs are financially poor persons.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated.

(c) The class includes all those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases.

5. As to said classes of persons:

(a) they are so numerous that joinder of all members is impracticable; (b) there are questions of laws and fact common to the class; (c) the claims of plaintiffs are typical of the claims of the class; (d) plaintiffs will fairly and adequately protect the interests of the class; and (e) defendant has acted and refuses to act on grounds generally applicable to the classes, thereby making appropriate final relief with respect to the class as a whole.

6(a). Defendant Berbling is, and was at all times mentioned herein, the States Attorney for Alexander County, and a citizen and resident of that County, the State of Illinois and the United States.

(b) As States Attorney he is the chief prosecuting attorney for said county.

(c) He has authority to determine when criminal complaints may be filed and warrants issued, whether and how to prosecute violations of state statutes, what the charges should be against accused persons, and also to recommend dismissals and reductions of charges, optimum sentences, and the terms thereof.

(d) On information and belief defendant Berbling may also recommend the amount of bond and whether a convicted defendant should pay costs.

7. Defendant Meisenheimer is, and was at all times mentioned herein, a Police Commissioner of the City of Cairo, and a citizen and resident of the City of Cairo, State of Illinois, and the United States. As such he supervises the activities of the Cairo Police Department and is the immediate supervisor of defendant Roy Burke.

8. Defendant Burke is and was at all times mentioned herein, the Chief of Police of the City of Cairo. He is a citizen and resident of said city, the State of Illinois, and the United States. As Chief of Police, he has the authority to enforce the ordinances of the City of Cairo and the laws of the State of Illinois. He is the chief law enforcement officer of the city and as such directly administers the affairs of the Cairo City Police Department.

9(a) Defendant O'Shea is, and was at all times mentioned herein, the Magistrate for the Circuit Court of Alexander County, and a citizen and resident of that County, the State of Illinois and the United States. As such, he has the authority to set bond for all persons

charged with crime either under state law or city ordinance. He also has the authority to handle preliminary hearings, trials of ordinance violations and misdemeanors. In each of such cases, he determines the outcome and, in the case of ordinances and misdemeanors, the sentence to be imposed.

(b) Defendant Spomer is, and was at all times mentioned herein, the Associate Circuit Judge for Alexander County, Illinois, and citizen and resident of that county, the State of Illinois and the United States. As such, she had the authority to act in all criminal matters in Alexander County.

FIRST CLAIM FOR RELIEF

10. Since the early 1960's black citizens of Cairo, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation in governmental decision making and in ordinary day-to-day relations with white citizens and officials of Cairo. As an important part of their protest plaintiffs have participated in and encouraged others to participate in an economic boycott of merchants of the City of Cairo who plaintiffs consider have engaged in racial discrimination.

11. This active and lawful seeking after long overdue constitutional rights has generated and continues to generate a great deal of tension and antagonism from the white citizens and officials of Cairo.

12(a). Defendant Berbling has long been one of those citzens and officials who have, on information and belief, stood against plaintiffs and their class.

(b) Defendant was an organizer and officer of the Committee of Ten Million, also known as the "White Hats", an organization, on information and belief, designed to

deter plaintiffs and their class from seeking or obtaining their constitutional rights.

(c) Said organization was formed in 1967 and in 1969 was ordered to disband by the State of Illinois as an illegal vigilante organization.

13. As is hereinafter set forth more fully, defendant Berbling has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

14. Defendant Berbling has denied and continues to deny to plaintiffs and members of their classes as described in paragraphs 3 and 4 herein of their constitutional rights in the following ways:

(a) It has been and continues to be the practice of defendant to refuse to initiate criminal proceedings and to refuse to hear criminal charges against members of the white race upon the complaints of members of the plaintiff class, for example:

(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against a white man who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cario, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area.

(2) In January 1970 defendant refused to permit Robert Martin to file charges against a white man, Charlie Sullivan, who tried to run him down

in a truck while peacefully marching in exercise of his First Amendment rights.

(3) In June 1970 defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

(4) In June 1970 defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(5) In May 1969 plaintiff Ewing and eight others could have and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendants practice of refusing to take complaints and were discouraged from making useless gestures.

(b) It has been and continues to be the practice of defendant Berbling in the few criminal proceedings he has instituted against white persons at the behest of plaintiffs, to inadequately prosecute the cases in order to lose, or to settle them on terms more favorable than those against blacks;

(c) It has been and continues to be the practice of defendant Berbling to request or recommend, in cases involving plaintiffs and members of their class, substantially greater bonds and sentences than requested or recommended in cases involving white persons;

(d) It has been and continues to be the practice of defendant to charge plaintiffs and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person.

15. Each of said practices is carried out wilfully and maliciously with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

16. Each of said practices is carried out wilfully and maliciously with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

17. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

18. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendant as hereinabove set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraph 14 of this complaint, and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class;

2. Defendant be preliminarily and permanently enjoined from requesting more severe bond and sentences for plaintiffs and members of their class than for white persons;

3. Defendant be preliminarily and permanently enjoined from setting more severe charges against plaintiffs

and members of their class than against white persons;

4. This Court maintain continuing jurisdiction in this action;

5. Grant to plaintiffs their costs and reasonable attorneys fees; and

6. Grant such other relief as to the Court may seem just and proper.

Second Claim for Relief

19. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6 and 10-17.

20. Each of the named plaintiffs suffered humiliation, despair, frustration, great anxiety, and physical distress as a result of the practices of defendant alleged in paragraph 14, and in particular by defendant's refusal to permit plaintiffs to initiate criminal proceedings.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

Third Claim for Relief

21. Plaintiffs reallege the allegations in paragraphs 1-3, 5, 7-8, and 10-11.

22. As hereinafter set forth more fully, defendants Burke and Meisenheimer have engaged in, and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of the City of Cairo, Illinois, in the enforcement of criminal justice in said city,

all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

23. Defendants Burke and Meisenheimer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) Defendants have made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.

(b) Defendants have made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the facts and is far more severe than like charges would be against a white person.

24. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

25. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

26. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

27. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraph 23 of this complaint, and that defendants be required to submit a monthly report to this Court concerning the nature, status and details of each arrest of and each charge filed against plaintiffs or members of plaintiff class in which the Police Department of the City of Cairo was involved in any way;

2. This Court maintain continuing jurisdiction in this action;

3. Grant to plaintiffs their costs and reasonable attorneys fees; and

4. Grant such other relief as to the Court may seem just and proper.

FOURTH CLAIM FOR RELIEF

28. Plaintiffs reallege the allegations in paragraphs 1-5, and 9-11.

29. As herein after set forth more fully, defendants O'Shea and Spomer have engaged in and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

30. Defendants O'Shea and Spomer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment, in that they follow an unofficial bond schedule wihout regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(b) On information and belief they set sentences higher for plaintiffs and members of plaintiff class than for white persons and impose harsher conditions.

(c) It is the custom and practice of defendants O'Shea and Spomer to require plaintiffs and members of their class when charged with violations or city ordinances which carry fine and possible jail penalties if the fine cannot be paid, to pay for a trial by jury, all in violation of their rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

31. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

32. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

33. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

34. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of their class of their constitutional rights in the manner set forth in paragraph 30;

2. Grant to plaintiffs their costs and attorneys fees herein; and

3. Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ MARTHA M. JENKINS
Martha M. Jenkins
Lawyers' Committee for
Civil Rights Under Law
909 Washington Avenue
Cairo, Illinois 62914

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

[Caption Omitted in Printing]

VERIFICATION

We, the undersigned, being duly sworn, say:

1. We are plaintiffs named in the annexed complaint and bring this suit on our behalf and on behalf of all other persons similarly situated.

2. We have read the annexed complaint and know the contents thereof.

3. We know of our own personal knowledge or believe that all of the facts stated therein are true except such as are stated on information and belief, and as to those facts, we believe them to be true.

/s/ JAMES W. BROWN
James W. Brown
/s/ EZELL LITTLETON
Ezell Littleton
/s/ JAMES WILSON
James Wilson
/s/ PRESTON EWING, JR.
Preston Ewing, Jr.

Subscribed and sworn to before me this 21st day of July.

/s/ CLYDIA M. KOEN
Notary Public

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed October 23, 1970

[Caption Omitted in Printing]

AMENDED COMPLAINT

Plaintiffs, Ezell Littleton, Manker Harris, James Wilson, Carl Hampton, Hazel James, Walter Garrett, Charles Koen, Frank Washington, Curtis Johnson, Cheryl Garrett, Yvonda Taylor, Russell Deberry, Robert Martin, Preston Ewing, Jr., James Brown, Herman Whitfield, Wallace Whitfield, Leroy Lambert, by his father and next friend, Hobert Lambert, Morris Garrett, by his father and next friend, Levi Garrett, individually and as representatives of a class, by their attorneys, Martha Jenkins, James B. O'Shaughnessy and Alan M. Wiseman, complain of defendants, Peyton Berbling, individually and as State's Attorney for Alexander County, Illinois, Earl Sheperd, individually and as investigator for Peyton Berbling, Carl Meisenheimer, as Police Commissioner of the City of Cairo, Illinois, Michael O'Shea, as Magistrate of the Circuit Court for Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois. Plaintiffs state as follows:

1. This is a civil-action under Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985 for damages and for preliminary and permanent injunctions and other equitable relief, to enjoin the deprivation, under color of law, custom and usage of Alexander County and the City of Cairo, Illinois, of plaintiffs and members of their class rights, privileges and immunities guaranteed by the First, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985.

2. Jurisdiction is conferred on this Court by Title 28 U. S. C. sections 1331 and 1343.

3(a) Plaintiffs are black citizens of the City of Cairo, Illinois, with the exception of plaintiffs Manker Harris and James Brown, who are white citizens of the City of Cairo, Illinois.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

4(a) Plaintiffs are financially poor persons.

(b) They bring this action as a class action, individually and on behalf of all other persons similarly situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases.

5. As to said classes of persons:

(a) they are so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims of plaintiffs are typical of the claims of the class; (d) plaintiffs will fairly and adequately protect the interests of the class; and (e) defendants have acted and refuse to act on grounds generally applicable to the classes, thereby making appropriate final relief with respect to the class as a whole.

6(a) Defendant Berbling is, and was at all times mentioned herein, the State's Attorney for Alexander County, Illinois and a citizen and resident of that County.

(b) As State's Attorney he is the chief prosecuting attorney for said county.

(c) He has authority to determine when criminal complaints may be filed and warrants issued, whether and how to prosecute violations of state statutes, what the charges should be against accused persons, and also to recommend dismissals and reductions of charges, length of sentences, and the terms thereof.

(d) On information and belief defendant Berbling may also recommend the amount of bond and whether a convicted defendant should pay costs.

7. Defendant Meisenheimer is, and was at all times mentioned herein, a Police Commissioner of the City of Cairo, and a citizen of the City of Cairo, Illinois. As such he supervises the activities of the Cairo Police Department.

8(a). Defendant O'Shea is, and was at all times mentioned herein, the Magistrate for the Circuit Court of Alexander County, Illinois and a citizen of that County. As such, he has the authority to set bond for all persons charged with crime either under state law or city ordinance. He also has the authority to handle preliminary hearings, trials of ordinance violations and misdemeanors. In each of such cases, he determines the outcome and, in the case of ordinances and misdemeanors, the sentence to be imposed.

(b) Defendant Spomer is, and was at all times mentioned herein, the Associate Circuit Judge for Alexander County, Illinois, and a citizen of that county. As such, she has the authority to act in all criminal matters in Alexander County.

9. Defendant Earl Shepherd is, and was at all times mentioned herein, employed by the Office of the State's Attorney as an investigator and assistant to defendant Berbling, and a citizen of Alexander County, Illinois.

FIRST CLAIM FOR RELIEF

10. Since the early 1960's black citizens of Cairo, Illinois, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation in governmental decision making and in ordinary day-to-day relations with white citizens and officials of Cairo. As an important part of their protest, plaintiffs have participated in and encouraged others to participate in an economic boycott of merchants of the City of Cairo who plaintiffs consider have engaged in racial discrimination.

11. This active and lawful seeking after long overdue constitutional rights has generated and continues to generate a great deal of tension and antagonism from the white citizens and officials of Cairo.

12. As is hereinafter set forth more fully, defendant Berbling has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and the right to be free from the vestiges of slavery as secured by the Thirteenth Amendment and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

13. Defendant Berbling, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprives plaintiffs of rights and

privileges as citizens of the United States by neglecting to provide for their personal safety, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety and property and by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety and property, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably and their right to hold property to the same extent as is enjoyed by white citizens.

14. Defendant Berbling has denied and continues to deny to plaintiffs and members of their classes as described in paragraphs 3 and 4 herein of their constitutional rights in the following ways:

(a) It has been and continues to be the practice of defendant to refuse to initiate criminal proceedings and to refuse to hear criminal charges against members of the white race upon the complaints of members of the plaintiffs' class and to deprive plaintiffs of their right to give evidence affecting their security, for example:

(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to in-

timidate his family in order to prevent James Wilson from holding property.

(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

(7) In May, 1969, Plaintiff Ewing and eight others could have and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures.

(b) It has been and continues to be the practice of defendant Berbling in those instances where complaints have been filed by black persons against white persons involving misdemeanors to submit such to a grand jury, rather than proceed by information or complaint,

and to interrogate complainants and witnesses before the grand jury with a purposeful intent to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example: Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than questold him regarding the incident, asked him such questions as "did you get paid for picketing?" A no-true bill was returned by the grand jury.

(c) It has been and continues to be the practice of defendant Berbling, in those instances where complaints have been filed by black persons against white persons involving misdemeanors, to submit such to a grand jury, rather than proceed by information or complaint, and, in some instances, fail to interrogate at all the complainant and witnesses respecting the incident, purposefully intending to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example:

(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers ar-

rived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo. A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident.

(d) It has been and continues to be the practice of defendant Berbling in the few criminal proceedings he has instituted against white persons at the behest of plaintiffs to inadequately prosecute the cases in order to lose or to settle them on terms more favorable than those against blacks;

(e) It has been and continues to be the practice of defendant Berbling to request or recommend, in cases involving plaintiffs and members of their class, substantially greater bonds and sentences than requested or recommended in cases involving white persons;

(f) It has been and continues to be the practice of defendant Berbling to charge plaintiffs and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person.

(g) Defendant Berbling has sought to deprive plaintiffs of their right to give evidence respecting the security of members of their class by seeking the dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which defendant would drop pending criminal charges against several of the plaintiffs.

15. Each of said practices is carried out wilfully and maliciously with intent to deprive plaintiff and members of their class of the benefits of the criminal justice system of Alexander County and to deprive plaintiffs and members of their class of the right to give evidence against those who threaten their security, peace, and tranquility and the right to hold property as enjoyed by white citizens.

16. Each of said practices is carried out wilfully and maliciously with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

17. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, viz., Sections 1981, 1982 and 1983 of Title 42, United States Code.

18. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendant as hereinabove set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff classes will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set

forth in paragraphs 13 and 14 of this complaint, and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class.

2. Defendant be preliminarily and permanently enjoined from neglecting his duties of office in failing to interrogate impartially and without discrimination witnesses before the grand jury.

3. Defendant be preliminarily and permanently enjoined from requesting more severe bond and sentences for plaintiffs and members of their class than for white persons;

4. Defendant be preliminarily and permanently enjoined from setting more severe charges against plaintiffs and members of their class than against white persons;

5. This Court maintain continuing jurisdiction in this action;

6. Grant to plaintiffs their costs and reasonable attorneys' fees; and

7. Grant such other relief as to the Court may seem just and proper.

SECOND CLAIM FOR RELIEF

19. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6 and 10-17.

20. Each of the named plaintiffs suffered humiliation, despair, frustration, great anxiety, and physical distress as a result of the practices of defendant alleged in paragraphs 12-14, and in particular by defendant's refusal to permit plaintiffs to initiate criminal proceedings, to give evidence, and to benefit from laws protecting their security to the same extent as white citizens.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

THIRD CLAIM FOR RELIEF

21. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6, 9-13 and 15-16.

22. Defendant Berbling in conspiracy with defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprived plaintiffs of rights and privileges as citizens of the United States, as follows:

(a) Defendants Berbling and Shepherd have conspired to deprive plaintiffs of equal protection of the laws by neglecting to provide for their personal safety, because of their race, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety.

(b) Defendants Berbling and Shepherd have conspired to prevent plaintiffs from giving evidence against white persons respecting acts threatening their personal safety with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to asemble peaceably. For example, on Saturday, August 8, 1970, plaintiff Hazel James was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo pursuant to a boycott when she was kicked in

the stomach by one Raymond Hurst. Plaintiff James was rushed to a hospital for treatment of the injury sustained. On Monday, August 10, 1970, plaintiff James sought to file a complaint, but defendant Shepherd, at defendant Berbling's direction, refused to allow it.

23. Such practices are carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983 and 1985 of Title 42, United States Code.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FOURTH CLAIM FOR RELIEF

24. Plaintiffs reallege the allegations of paragraphs 1-3, 5, 9-11, 15-17 and 20.

25. Defendant Shepherd has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

26. Defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprives plaintiffs of rights and privileges as citizens of the United States by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably; for example:

On August 10, 1970, defendant Shepherd refused to permit plaintiff Hazel James to file criminal charges against one Raymond Hurst, a white man, who, on August 8, 1970, had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo.

Wherefore, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FIFTH CLAIM FOR RELIEF

27. Plaintiffs reallege the allegations in paragraphs 1-3, 5, 7 and 10-11.

28. As hereinafter set forth more fully, defendant Meisenheimer has engaged in, and continues to engage in, a pattern and practice of conduct, under color of law, custom and usage of the City of Cairo, Illinois, in the enforcement

of criminal justice in said city, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983, 1985, and 1986, Title 42, United States Code.

29. Defendant Meisenheimer has denied and continues to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.

(b) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the facts and is far more severe than like charges would be against a white person.

30. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

31. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

32. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First,

Thirteenth and Fourteenth Amendments to the Constitution of the United States.

33. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraph 29 of this complaint, and that defendants be required to submit a monthly report to this Court concerning the nature, status and details of each arrest of and each charge filed against plaintiffs or members of plaintiff class in which the Police Department of the City of Cairo was involved in any way;

2. This Court maintain continuing jurisdiction in this action;

3. Grant to plaintiffs their costs and reasonable attorneys fees; and

4. Grant such other relief as to the Court may seem just proper.

SIXTH CLAIM FOR RELIEF

34. Plaintiffs reallege the allegations in paragraphs 1-5 and 8 and 10-11.

35. As hereinafter set forth more fully, defendants O'Shea and Spomer have engaged in and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of

law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

36. Defendants O'Shea and Spomer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(b) On information and belief they set sentences higher for plaintiffs and members of plaintiffs' class than for white persons and impose harsher conditions.

(c) It is the custom and practice of defendants O'Shea and Spomer to require plaintiffs and members of their class when charged with violations or city ordinances which carry fines and possible jail penalties if the fine cannot be paid, to pay for a trial by jury, all in violation of their rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

37. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

38. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

39. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First,

Thirteenth and Fourteenth Amendments to the Constitutions of the United States.

40. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of their class of their constitutional rights in the manner set forth in paragraph 36.

2. Grant to plaintiffs their costs and attorneys fees herein; and

3. Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ James B. O'Shaughnessy
James B. O'Shaughnessy
/s/ Alan M. Wiseman
Alan M. Wiseman

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed on August 25, 1970

[CAPTION OMITTED IN PRINTING]

MOTION TO STRIKE COMPLAINT AND DISMISS CAUSE

Now come Michael O'Shea, as Magistrate of the Circuit Court of Alexander County, Illinois and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois, defendants in the above entitled cause, by William J. Scott, Attorney General, and moves the court to enter its order striking the Complaint and dismissing this cause as to these defendants with prejudice and forever bar this action as to these defendants and as grounds therefor, state unto the court:

1. That the above entitled cause is a civil action.

2. That at all times mentioned in plaintiff's Complaint herein, these defendants were and still are Judges of the Circuit Court of Alexander County.

3. That at all times mentioned in the plaintiff's Complaint herein, these defendants were acting in their judicial capacity as Judges.

4. That by virtue of their judicial office and their acts and doings as judges these defendants are as a matter of law immune from civil suits based upon their judicial acts.

5. That the plaintiff's Complaint fails to state a claim against these defendants upon which relief can be granted.

6. That plaintiff's Complaint does not comply with Rule 8(e)(1) and 10(b) of the Federal Rules of Civil Procedure.

Wherefore, these defendants move that this Complaint be stricken as to them and that the cause of action as to them be dismissed with prejudice.

MICHAEL O'SHEA, Magistrate of the Circuit Court of Alexander County,
DOROTHY SPOMER, Associate Circuit Judge for the Circuit Court of Alexander County,

Defendants,

WILLIAM J. SCOTT, Attorney General of the State of Illinois,

Their Attorney.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

Filed Oct. 29, 1970

[Caption Omitted in Printing]

Now come defendants, Peyton Berbling, individually, and as State's Attorney for Alexander County, Illinois, and Earl A. Shepherd, Jr. (erroneously sued herein as Earl Sheperd), individually, and as investigator for Peyton Berbling, State's Attorney of Alexander County, Illinois, and say:

A.

They move to dismiss the Amended Complaint herein and this action as against them, and each of them, and in support thereof, say:

1. The Amended Complaint wholly fails to state a claim upon which the relief prayed or any relief can be granted.

2. It appears from the face of the Amended Complaint that defendant, Peyton Berbling, is the duly elected, qualified and acting State's Attorney for Alexander County, Illinois, and that defendant, Earl A. Shepherd, Jr., is and was at all relevant times, an employee and assistant to the State's Attorney for Alexander County, Illinois; it further appears from the face of the Amended Complaint that the matters and things complained of against said defendants, and each of them, allegedly transpired while said defendants held their respective offices and while they and each of them were acting in their official capacities as such State's Attorney and his employee and assistant.

3. The matters and things alleged against each of said defendants occurred, if at all, as a result of the performance by them, and each of them of acts of a judicial or quasi-judicial nature in the official position as State's Attorney

of Alexander County, Illinois, and his employee and assistant and they are, therefore, as a matter of law immune from civil action under the Civil Rights Act mentioned in the Amended Complaint, or otherwise.

4. The paragraphs under the caption "Third Claim for Relief" and the prayers for relief thereunder, as well as all references in this action to Title 42, U. S. C., Section 1985, should be dismissed or stricken from the Amended Complaint herein for failure to state a claim upon which relief can be granted, by reason of the fact that there are no allegations of any conspiracy to prevent, by force, intimidation, or threat, plaintiffs, or any or either of them, from enjoying the rights and privileges set forth in said section.

B.

In the alternative, these defendants move that the following portions of said Amended Complaint, and each of the same, be stricken:

1. With respect to the allegations of said Amended Complaint pertaining to a Class Action, paragraphs 3(a), 3(b), 3(c), 4(a), 4(b), 4(c), 5(a) and all references to "members of their class" contained in paragraphs 12, 14, 14(a), 14(b), 14(c), 14(e), 14(f), 14(g), 15, 16, 17, 18, paragraphs 1, 3 and 4 of the prayers for relief under the caption "First Claim for Relief", and all such references in paragraphs 23 (under the caption "Second Claim for Relief") and paragraph 25 (under the capition "Fourth Claim for Relief").

2. The allegations of said Amended Complaint are wholly insufficient to warrant the maintaining of a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure.

3. It affirmatively appears from the face of the Amended Complaint that common questions of fact with respect to

the specific actions alleged against these defendants do not exist and such allegations will not support a class action.

4. The class or classes for which this action is attempted to be maintained are not sufficiently and specifically described and cannot be categorized as "black citizens of the City of Cairo, Illinois" or "those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials" within the City of Cairo, Illinois.

5. Plaintiffs are neither representative of nor authorized to act or speak for all of the black citizens or poor people of the City of Cairo, Illinois.

6. Such classes, or neither of them, cannot be defined or sufficiently described to authorize a class action.

7. The following paragraphs should be stricken from the Complaint because they are redundant, immaterial, impertinent and scandalous, in violation of Rule 12(f) of the Federal Rules of Civil Procedure, or because they contain allegations which are so vague, ambiguous and unspecific that it is impossible to prepare and prosecute a proper defense with respect thereto, all in violation of Rule 8(e)(1) of the Federal Rules of Civil Procedure, to-wit: Paragraphs 10, 11, 13, 14(a)(1), 14(a)(2), 14(a)(3), 14(a)(4), 14(a)(6), 14(a)(7), 14(b), 14(c), 14(c)(1), 14(c)(2), 14(d), 14(e), 14(f), 14(g) and 20, all of the Amended Complaint.

8. With respect to the prayers for relief against these defendants:

(a) The prayers for relief under the caption "First Claim for Relief" would involve an unwarranted and unlawful invasion of the duties and responsibilities of defendant, Peyton Berbling, as the duly elected, qualified and acting State's Attorney of Alexander County, Illinois, and would constitute an invasion of and interference with the exercise by him of his official discretion and judgment and the powers and discretion of the Grand Jury of Alexander County, Illinois; in addition, the grant-

ing of such prayers would involve interpretations and standards which are impossible of ascertainment.

(b) With respect to the prayers for relief contained under the captions "Second Claim for Relief", "Third Claim for Relief", and "Fourth Claim for Relief", there are no allegations showing or alleging that plaintiffs, or either of them, have sustained any monetary damages and there are no allegations in the Amended Complaint sufficient to entitle plaintiffs, or either of them to punitive damages.

/s/ JOHN M. FERGUSON
John M. Ferguson
One South Church Street
Belleville, Illinois 62220
277-1110 (618)

/s/ HAROLD G. BAKER, JR.
Harold G. Baker, Jr.
One South Church Street
Belleville, Illinois 62220
277-1110 (618)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois
Filed November 10, 1970
[Caption Omitted in Printing]

ELECTION TO STAND ON MOTION TO STRIKE COMPLAINT AND DISMISS CAUSE AND BRIEF IN SUPPORT OF SUCH MOTION HERETOFORE FILED

Now comes Michael O'Shea as Magistrate of the Circuit Court of Alexander County, Illinois, and Dorothy Spomer as Associate Circuit Judge for Alexander County, Illinois, defendants in the above entitled cause by William J. Scott, Attorney General of the State of Illinois, advising this court that these defendants elect to stand on their Motion to Strike Amended Complaint and Dismiss Cause. The court is further advised that these defendants adopt their brief heretofore filed in support of said Motion.

Wherefore, these defendants move that the amended complaint filed herein be stricken as to them and that the cause of action as to them be dismissed with prejudice.

MICHAEL O'SHEA,
Magistrate of the Circuit Court of Alexander County,

DOROTHY SPOMER,
Associate Circuit Judge for the Circuit Court of Alexander County,

Defendants.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,

Their Attorney.

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

April 2, 1973

Re: O'Shea v. Littleton, No. 72-953
Spomer v. Littleton, No. 72-955

Dear Sir:

The Court today took the following action in the above cases:

"The petitions for writs of certiorari are granted and the cases are set for oral argument in tandem."

Very truly yours,
MICHAEL RODAK, JR.,
Clerk.

Supreme Court, U. S.
FILED
JAN 3 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

PEYTON BERBLING, INDIVIDUALLY AND AS STATE'S ATTORNEY FOR ALEXANDER COUNTY, ILLINOIS (W. C. SPOMER, SUCCESSOR TO PEYTON BERBLING), EARL SHEPHERD, INDIVIDUALLY AND AS INVESTIGATOR FOR PEYTON BERBLING, CARL MEISENHEIMER, AS POLICE COMMISSIONER OF THE CITY OF CAIRO, ILLINOIS, MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, AND DOROTHY SPOMER, AS ASSOCIATE CIRCUIT JUDGE FOR ALEXANDER COUNTY, ILLINOIS,

Petitioners,

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, BY HIS FATHER AND NEXT FRIEND, HOBERT LAMBERT, MORRIS GARRETT, BY HIS FATHER AND NEXT FRIEND, LEVI GARRETT, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago, Illinois 60601 (793-3500),
ROBERT J. O'ROURKE,
First Assistant Attorney General,
JOHN W. FREELS,
Special Assistant Attorney General,
Of Counsel.

Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. _____

PEYTON BERBLING, INDIVIDUALLY AND AS STATE'S ATTORNEY FOR ALEXANDER COUNTY, ILLINOIS (W. C. SPOMER, SUCCESSOR TO PEYTON BERBLING), EARL SHEPHERD, INDIVIDUALLY AND AS INVESTIGATOR FOR PEYTON BERBLING, CARL MEISENHEIMER, AS POLICE COMMISSIONER OF THE CITY OF CAIRO, ILLINOIS, MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, AND DOROTHY SPOMER, AS ASSOCIATE CIRCUIT JUDGE FOR ALEXANDER COUNTY, ILLINOIS, *Petitioners,*

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, BY HIS FATHER AND NEXT FRIEND, HOBERT LAMBERT, MORRIS GARRETT, BY HIS FATHER AND NEXT FRIEND, LEVI GARRETT, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, Michael O'Shea and Dorothy Spomer, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Seventh Circuit, entered in this proceeding on October 6, 1972.

OPINION BELOW.

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Illinois appears in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. On November 3, 1972 petitioners filed with the Court of Appeals a Motion for Recall and Stay of the Mandate pending a petition for certiorari in this Court. The Court of Appeals on November 7, 1972, denied the Motion. On November 22, 1972, petitioners filed an application for Stay of Mandate with the Honorable William H. Rehnquist which was granted on November 28, 1972. On December 11, 1972 this Court sitting *en banc* affirmed the stay of mandate as it applied to O'Shea and Spomer. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the common law doctrine providing for judicial immunity for judicial acts in the exercise of legal discretion was abolished by Congressional civil rights enactments where mandatory injunctive relief is sought.

2. Whether a class may maintain an action for mandatory injunction against a state court judge for an alleged past discriminatory predisposition where no allegation has been made that any member of that class has been injured or been before that judge in any proceeding.

3. Whether in view of the historic comity relationship between federal and state judicial systems, a federal district judge may establish guidelines to control the exercise of lawful state judicial discretion in future criminal matters based upon a civil suit in equity generally alleging a past discriminatory predisposition to that class.

4. Whether a class may maintain an action for mandatory injunction against a state court judge for an alleged past discriminatory predisposition upon a complaint which alleges only general and conclusatory allegations and evidences no instance of such conduct.

STATUTES INVOLVED.

42 U. S. C. §§ 1981, 1982, 1983 and 1985, are reprinted in full in the Appendix at pages 61-63.

STATEMENT OF THE CASE.

Petitioner, Michael O'Shea, a Magistrate of the Circuit Court of Alexander County, Illinois, and Dorothy Spomer, an Associate Circuit Judge for Alexander County, Illinois, were made defendants to a Civil Rights Action charging that they and others, as law enforcement functionaries of Alexander County, have engaged in patterns and practices of conduct in the administration of criminal justice so as to systematically discriminate against respondents and their class on the basis of race, thereby interfering with respondents' First, Sixth, Eighth, Thirteenth and Fourteenth Amendment rights and in violation of 42 U. S. C. §§ 1981, 1982, 1983 and 1985. The Amended Complaint in the first, second, third, and fourth claims for relief set out eleven specific acts of alleged discriminatory conduct on the part of defendant State's Attorney Berbling and investigator Shepherd. The sixth claim for relief contains

general and conclusatory allegations against these petitioners which reveal no specific references whatever to any past discriminatory conduct of either petitioner.

The alleged conduct includes: (a) that petitioners set bond in criminal cases by following an unofficial bond schedule without regard to the facts of the case or circumstances of an individual defendant, (b) that petitioners sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct, and (c) that petitioners require respondents and members of their class to pay for a trial by jury when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid.

Though the Complaint alleges in paragraph 36 (b) that O'Shea and Spomer sentence black persons to longer terms and impose harsher conditions than for white persons similarly charged, the Complaint does not mention a single instance of such conduct in the past nor does it charge that the sentences were not within the petitioners' lawful discretion. The respondents evidence no request for relief either by *habeas corpus* or appellate review by any member of their class or for anyone else for any past judicial discrimination by either Spomer or O'Shea. In the absence of any specificity as to alleged past conduct we can only assume the language used expressed a fear of possible discrimination in the future. This is borne out by the prayer for relief to enjoin these petitioners "from depriving plaintiffs of their constitutional rights as set forth in paragraph 36".

Allegations (a) and (c) do not state that respondents are treated any differently than any other persons. Allegation (a) above generally charges that petitioners follow an unofficial bond schedule in criminal cases; no charge

is made as in (b) above that there exists discrimination as between white and black persons. In addition, the Court of Appeals itself expresses doubt as to the meaning of allegation (c) in footnote 1, page 5 of the Court's Opinion (App. 6). In sum, the issue as drawn by the pleadings relates only to allegation (b) above, i.e. a judge's discretionary role in imposing sentence on a lawfully convicted defendant. The unsworn complaint alleges no factual situations involving judges and contains only one allegation of discrimination by judges—that in paragraph 36(b) of the Amended Complaint which is alleged only on information and belief. Since this petition is filed solely on behalf of the two judges, O'Shea and Spomer, the question is limited to the allegations as set forth above.

The District Court dismissed the Complaint on March 23, 1971, on the grounds that (1) it lacked jurisdiction to entertain a cause seeking to have a federal court substitute its judgment for the judgment of the state judiciary, and (2) in the regular performance of their duties, judicial immunity barred relief in an action under the Civil Rights Act. A copy of the District Court's opinion is set forth in the Appendix, pp. 56-60. On October 6, 1972, the Court of Appeals in a two to one decision reversed the judgment of the District Court holding that a federal district court may entertain actions requiring federal supervision and regulation by mandatory injunction over the discretion which state court judges may lawfully exercise within the limits of authority granted them by law. The Court held that: 1) the Complaint stated a cause of action against these petitioners cognizable under 42 U. S. C. §§ 1981, 1983 (and perhaps § 1982), and (2) the doctrine of judicial immunity did not extend to petitioners in light of the legislative history of the Civil Rights Acts of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, Ch. 22, 17 Stat. 13) where injunctive relief is sought. A copy of that opinion is available in the Appendix pp. 1-55.

On November 3, 1972, petitioners filed with the Court of Appeals a motion for recall and stay of the mandate pending a petition for certiorari in this Court. The Court of Appeals on November 7, 1972 denied the motion.

On November 22, 1972, petitioners filed with the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States, an application for stay of the mandate of the Court of Appeals. On November 28, 1972 the stay was granted. Subsequently, on December 11, 1972 this Court sitting *en banc* affirmed the stay of mandate as it applied to O'Shea and Spomer.

REASONS FOR GRANTING WRIT.

I.

The Two to One Decision of the Court Below Is Contrary to Controlling Decisions of This Court and the Great Weight of Authority in the Federal Courts.

In reliance upon what it conceived to be an historical imperative, the Seventh Circuit has here held that a federal district court may entertain actions for mandatory injunctions under 42 U. S. C. § 1983 against a state court requiring supervision and regulation over the discretion which it may lawfully exercise within the limits of authority granted it by law. Holding that the venerable doctrine of judicial immunity did not extend to state judicial members, where injunctive relief is sought, the Court of Appeals selectively recounted the history of the Civil Rights Act of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, 1871; Ch. 22, 17 Stat. 13) (See Appendix, pp. 12-16 and 17-20) as it appears substantially in *Monroe* v. *Pape,* 365 U. S. 167 (1961).

The Court of Appeals surmised that the words "any person" in § 2 of the Civil Rights Act of 1866 seemed to

include state judges and that in considering criminal sanctions Congress clearly had decided to, eliminate judicial immunity (App. 14). Yet, in reviewing the debates in their entirety it becomes clear that Congress became rent with discord on that subject. At least for the purposes of state judges, the debates concentrated upon whether a state court judge could be held criminally liable for the enforcement of state statutes which were discriminatory. Even the Court below cited the comments of Illinois Senator Trumbull, the bill's principal sponsor, wherein he stated:

> ". . . I admit that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an *illegal act*, may be and ought to be punished; but if he acted innocently, the judge would not be punished." (emphasis added) (App. 13, 14).

It is evident that the Senator was referring to liability only if a judge was acting pursuant to a state law or custom which was illegally discriminatory. Statements of other Congressional members[1] and, in addition President Johnson,[2] who vetoed the bill, indicate that their objections were grounded upon this premise.

The case of *Monroe* v. *Pape*, 365 U. S. 167 (1961) at page 497 decisively established the view that the "under color of law" provision of § 1983 applied to unconstitutional actions taken without state authority as well as to unconstitutional action authorized by the state. In that case police officers had searched a home without a warrant, arrested and detained the plaintiff without arraignment. They argued that they had acted outside state law, custom

1. Cong. Globe, 39th Cong., 1st Sess. (1866) Senator Cowan (Pa.) at p. 475; Senator Hendricks (Ind.) at 602; Mr. Raymond at 1267, Senator Johnson (Maryland) at 1778; Mr. Stewart (Ga.) at 1782.

2. Cong. Globe, 39th Cong. 1st Sess. (1866) at 1680.

or usage and therefore had not acted under "color of" state authority, thereby preventing federal jurisdiction. This Court rejected that view decisively. However, *Monroe* did not discuss the doctrine of the judicial immunity exception to the Civil Rights Act and is not dispositive since that issue was not before the Court. Little solace can be afforded the notion that *Monroe's* historical analysis elucidates the topic of judicial immunity in light of this Court's holding in *Pierson* v. *Ray,* 386 U. S. 547 (1967). Manifest in the historical analysis of *Monroe* is the absence of the debates concerning judicial officers and their immunities. Moreover, in light of *Bradley* v. *Fisher,* 13 Wall. 335 (1872) and *Tenny* v. *Brandhove,* 341 U. S. 367 (1951), the extension of the doctrine in the *Monroe* decision to judges and legislators would have been evidenced in that opinion.

In 1967, this Court held in *Pierson* v. *Ray, supra,* at pp. 553-5, that the common law immunity of judges from civil action for acts committed within their judicial jurisdiction was so settled a principle as to be excepted from the provisions of § 1983. Furthermore, this Court passed upon the legislative history, which the Court below held to be so incisive, and found that history wanting, so much so that it "gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Mr. Chief Justice Warren expressed the feelings of eight members of the Court when he wrote:

> ". . . we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

Conspicuously, the defendant-judge in *Pierson* was alleged to have conspired with police officers to deprive the plaintiffs of the civil rights. This Court noted, at p. 553, that the record was barren of any proof or specific allegation that he played any role in the arrests and convic-

tions other than to adjudge the plaintiffs guilty when their cases came before his court. The proof of conspiracy never went beyond the suggestion that only inferences could be drawn from the judge's judicial decisions, and this the Court felt was not enough (see footnote 8, p. 554). In the cause at bar only a course of conduct is alleged where, at best, no more than a similar inference could be drawn.

The Court of Appeals draws the narrow distinction that while judges are immune from damage suits, they remain liable by mandatory injunction if ever anyone should allege class discrimination to the federal courts. Petitioners submit that no distinction lies as to judicial immunity for damages and injunctive immunity for a judge's lawful exercise of his discretion and that this Court's rationale in *Pierson* is poignantly applicable:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, LR 3 Ex 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349; note, at 350, 20 L. ed. at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray, supra,* at 553, 554.

While admitting that the question of injunctive relief under § 1983 had been considered by only a very few courts (see App. 31, 32), the Seventh Circuit cited *United States* v. *Clark,* 249 F. Supp. 720 (S. D. Ala. 1965), *United States*

v. *McLeod*, 385 F. 2d 734 (5th Cir. 1967), *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (M. D. Fla. 1969) as ample precedent for its holding.

However, the cases cited by the majority in which the doctrine of equitable relief has been applied, the relief granted has been in the form of a prohibitory injunction confining the state officials to the limits of their legal authority. Judge Dillon persuasively argued in his dissent below (App. 48) that "[T]here is a great difference between ordering an official not to do a particular act, measured by objective standards, and in ordering him to exercise his discretion in a certain way, measurable only by subjective standards".

U. S. v. *Clark, supra*, decided before *Pierson* v. *Ray, supra*, held that a preventative injunction would lie against the state judges where the United States sought an injunction under § 206(a) of the Civil Rights Act of 1964, against interference with both the right to vote and interference with the rights of a citizen to use places of public accommodations. This seminal case, though never decided by a higher appellate court, dismissed out of hand the doctrine of judicial immunity and founded its decision on *U. S.* v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), *cert. denied* 369 U. S. 850. The relief granted, however, in *Wood* was based upon a mandatory injunction statute, 42 U. S. C. § 1971(b), where the right of action was given to the *United States* to prevent intimidation of citizens registering to vote. The question of immunity was not before the court.

Furthermore, the *Clark* court, while acknowledging principles of comity (at p. 729), pronounces that "no State official is immune from having his conduct challenged" (citing cases, p. 727). Yet, *Clark*, under the aegis of 42 U. S. C. § 1971 of Title II of the 1964 Act (not § 1983),

confessed that no interference with judicial discretion occurred since the action taken was merely to *prevent* trial, not to exercise the judge's control of it.

U. S. v. *McLeod,* 385 F. 2d 734, 738 n. 3 (5th Cir. 1967), citing *Pierson* in a footnote and recognizing *Clark* in the text, concerned the arresting and prosecuting of Black citizens who had been active in voter registration. The facts of *McLeod* demonstrated that local officials had harassed and attempted to intimidate Black citizens from exercising their right to vote. Under the auspices of 42 U. S. C. § 1971(b), the United States sought an injunction to prevent prosecution of these arrested persons because prosecution violated § 1971(b) since the trial judge did not decide the case on the statutory standard. The Fifth Circuit commented:

> "It is clear, however, that acts may violate section 1971(b) even though they deprive no one of his constitutional rights. Acts otherwise entirely within the law may violate the statute if they have the proscribed effect and purpose. (citing cases) The inquiry, therefore, is not whether the defendants have transgressed the Constitution. It is whether they have violated the statute." *U. S.* v. *McLeod, supra,* at 740.

The Court below referred briefly to *Phillips* v. *Cole,* 298 F. Supp. 1049 (N. D. Miss. 1968) as demonstrative of the issue before this Court (App. 32). However, in *Phillips,* the plaintiffs were engaged in civil rights activities and sought injunction against two state judges and their successors from failing to advise them of their right to counsel. This case clearly involved a preventative injunction, compelling the justices to perform a *ministerial* duty, the absence of which violated the Sixth Amendment.

In *Bramlett* v. *Peterson,* 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969), plaintiffs sought a class action to enjoin state judges from failing to advise indigent misdemeanants

of their right to court-appointed counsel. The district court characterized its action preventative and claimed ample precedent in *U. S.* v. *Clark, supra,* and *Phillips* v. *Cole, supra.* Yet, in *Bramlett* the court limited its injunctive relief since "there is no infringement of the judicial function or judicial discretion; rather, this order affects the peace justice *only if he fails to exercise a mandatory, non-discretionary, and ministerial duty.*" (emphasis added).

In effect, then, most of the Court of Appeals' authority for injunctive relief rests on cases which follow the district court case of *U. S.* v. *Clark, supra,* except, e.g., *Ex parte Virginia,* 100 U. S. 347 (1879), which labelled the activities of Judge Cole "ministerial" and left no doubt that the aggrieved behavior was not discretionary. (see *Virginia,* pp. 348-9)

Albeit an exhaustive study of injunctive relief under § 1983 was made by the Court below, the discordant case of *MacKay* v. *Nesbett,* 285 F. Supp. 498, 502, 503 (D. C., Alaska, 1968), affirmed 412 F. 2d 846 (1969), cert. denied 396 U. S. 960, was inadvertently overlooked. In that case an equitable proceeding was brought against a majority of the justices of the Alaska Supreme Court to have a final order suspending plaintiff from the practice of law for one year declared null and void and to enjoin its effect. Jurisdiction was invoked under the Civil Rights Act (28 U. S. C. § 1343), 42 U. S. C. § 1983, and under the Federal Questions Statute (28 U. S. C. § 1331). Upon consideration of a motion to dismiss, the district court evaluated the jurisdictional question on two grounds: (1) the anti-injunction statute, 28 U. S. C. § 2283, (2) judicial immunity, and found either ground sufficient to grant dismissal. While the Court's position in *MacKay* as to 42 U. S. C. § 2283 is no longer tenable in light of *Mitchum* v. *Foster,* 40 U. S. L. W. 4737, (U. S. June 19, 1972), the Court's analysis of judicial immunity and § 1983 remains compelling.

Reaffirming the tenet of judicial immunity for judicial acts, the Court held "[T]he Civil Rights Act creates no exception to this immunity," citing *Pierson* v. *Ray, supra, Sires* v. *Cole,* 320 F. 2d 877 (9th Cir. 1963), *Johnson* v. *MacCoy,* 278 F. 2d 37 (9th Cir. 1960), *Hagan* v. *State of California,* 265 F. Supp. [illegible] (C. D. Cal. 1967).

> "The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages. (citations omitted) The reasons for the rule of judicial immunity apply regardless of the nature of the relief sought." *MacKay* v. *Nesbett, supra,* at 503.

The application in *MacKay* of the damages rationale to equitable relief where judicial entailment exists, demonstrates the viability of the immunity doctrine and the incongruous positions held by the Ninth Circuit and Seventh Circuits. These conflicts justify the grant of certiorari to review the judgment below. Petitioners submit that the damage proscription should apply where a class as exists herein attempts to invoke the provisions of § 1983 to enjoin a state judge based upon alleged past discriminatory conduct where he has acted within his discretionary powers granted him by law.

The reasoning in the ancient case of *Bradley* v. *Fisher,* 13 Wall 335, 80 U. S. 649, 650 (1871) is no less potent today:

> ". . . For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the

weakness of judicial authority in a degrading responsibility. *Taaffe* v. *Downes*, 3 Moore, P. C. 41, n.

* * * * *

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. . . .

* * * * *

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; . . ."

II.

The Decision Below Raises Significant and Recurring Problems Concerning the Historic Relationship of the Federal and State Judicial Systems.

At present, the Seventh Circuit countenances actions, the consequences of which permit a federal district judge to pass judgment upon whether a state court judge has exercised lawful discretion in criminal proceedings. This decision opens the door to wholesale federal analysis of lawful state criminal convictions. The effect of permitting actions against the state judiciary in the exercise of their lawful discretionary authority would be to irreparably harm the administration of criminal justice at the state level and erode the historic relationship between state and federal judicial systems.

Petitioners do not contend that federal courts may not grant equitable preventative relief in criminal actions. This area is well settled.[3] However, they challenge the decision of the Court below: (1) permitting class equitable relief to those who have never appeared before nor been affected by petitioners' rulings, and (2) permitting equitable relief based upon past and possible future discretionary conduct.

In effect, then, the Seventh Circuit's position leads to the egregious result that any group (whether injured or not) may seek an injunction in federal court against a state judge whom they feel has a past record of sentencing or inclination antipathetical to them. Therefore, it is not too remote to propose that a group e.g. Mexican-American citizens, Italian-American citizens, Jewish citizens, Puerto Rican citizens, Irish-American citizens, white-Anglo-Saxon-American citizens, *ad infinitum*, could also compel a state judge to defend his discretionary past conduct before a federal district judge. Extending the possibilities sanctioned by the Court below to its most absurd result, a state court judge could literally spend so much time defending his actions in frivolous suits at the federal bar that he could not perform his state judicial duties! See especially: *Greenwood* v. *Peacock*, 384 U. S. 808 at 832 (1966).

The action countenanced by the Court below will result in the federal courts sitting no only in review of state discretionary decisions but as a court of appeal from the state criminal trial. Though the action sanctioned here is civil, it requires the review of past *criminal* decisions. In addition, the likelihood is great that similar class actions would be taken to the district courts from state criminal actions on the grounds that the judge will or has a propensity to discriminate against his particular group. The

3. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), *Younger* v. *Harris*, 401 U. S. 37 (1971), *Boyle* v. *Landry*, 401 U. S. 77 (1971).

result, then, is to exchange state remedies[4] in favor of district court review.

The Court below tempered its holding, however, by proposing guidelines for the district courts (App. 46):

> "Nevertheless, as this appears to be a case of first impression as to the type of relief approved, we feel obligated to give the district court some guidelines as to what type of remedy might be imposed. We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's attorney. An initial decree might set out the general tone of rights to be protected and *require only periodic reports of various types of aggregate data on actions* on bail and sentencing and dispositions of complaints." (emphasis added)

The effect of the decision of the Seventh Circuit will be to "chill" judicial decision in the disposition of justice in the state of Illinois; in effect, then, a state judge must "look over his shoulder" each time he exercises his discretion, as he may properly do by law, for fear that by some nebulous standard of statistical analysis he has not meted out "justice" in accordance with a federal district judge's personal formula. In addition, a state judge would be more apt to qualify or balance sentences or amounts of bail in accordance, not with what the circumstances may have warranted, but with the nagging fear that leniency or strictness (irrespective of whether deserved) over a period of time would be interpreted as deliberate discriminatory conduct.

Subjecting a state judge to federal review each time a dissatisfied but lawfully convicted defendant alleges class discrimination would require federal courts to conduct an evidentiary hearing to determine whether a pattern of discrimination existed. A judge operating under an abstruse

4. e.g. change of venue, appellate review, removal (See Argument p. 21, n. 7).

order not to discriminate in fixing bonds and sentencing would find himself confronted with the possibility of a federal contempt citation and the necessity to defend his motivation in each case. The burden on the federal system would be, in the least, cumbrous and unworkable. The effect on the state system would be to create an oppressive atmosphere of federal supervision, cf., *Greenwood* v. *Peacock,* 384 U. S. 808 (1966), and render it oftentimes impotent.

Petitioners submit that subjecting state court judges to federal supervision violates the historic comity relationship between the federal and state judicial systems and presages the dilemma of interference with Article 4, § 4 of the United States Constitution,[5] Cf., *Bauers* v. *Heisel,* 361 F. 2d 581 (3rd Cir., 1966).

Mandatory injunction in the case at bar as effectuated by the court below places the discipline of Illinois state court judges in the hands of the federal district courts, rather than the people of the state by whom they are elected.[6]

The overall result of subjecting the state judiciary to federal review under these circumstances will be to undermine state dispensation of criminal justice and the citizen's belief that justice is being done. In the words of a great English jurist:

> "It is not enough that justice be done, but that the people are assured that justice is being done."

Petitioners submit that the decision below dissipates the effectiveness of the doctrine of comity. The Court of Appeals has held that though the principles of *Younger* v.

5. "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." *See also,* The Federalist, pp. 236, 303-305, 447 et. seq., 494 et seq.

6. The Illinois Courts Commission provides for disciplinary supervision by the Illinois Supreme Court. *See also,* Illinois Constitution of 1970 Article VI, Sections 9(b) and 9(c).

Harris, 401 U. S. 37 (1971) do not control this civil action, if it did "the plaintiffs' allegations are sufficient to come within the 'exceptional circumstances test' . . ." (App. 34) Yet, the amended complaint makes only general and conclusatory statements of bad faith and no instance of where it could have occurred is even alleged. In addition, respondents' claim of irreparable harm is illusory since not one member of the class has clearly shown injury.

While reciting the recent case of *Mitchum* v. *Foster*, *supra* (at 4742), the Seventh Circuit was remiss in overlooking this Court's declaration:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger* v. *Harris*, 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Steffanelli* v. *Minard*, 342 U. S. 117; *Cameron* v. *Johnson*, 390 U. S. 611."

Assuming, *arguendo*, that injunctive relief could issue, petitioners present that in the case herein, the juxtaposition of judicial discretion in past criminal cases and a later civil action are so intermingled as to warrant the strict application of the *Younger* v. *Harris*, *supra*; *Boyle* v. *Landry*, 401 U. S. 77 (1971); and *Perez* v. *Ledesma*, 401 U. S. 82 (1971) standards for federal intervention.

III.

Even if it is Contended, Contrary to the Decisions of This Court, That Judicial Immunity for Discretionary Acts of a Judge Does Not Apply in Civil Rights Cases, the Opinion of the Court Below by Its Own Language Was Improper on the Record in This Case.

As analyzed above, controlling decisions of this Court as well as the great weight of authority in all federal courts hold that judicial immunity for discretionary acts still exists in civil rights cases.

As set out in the Statement, the complaint in this case recited eleven specific acts of alleged discrimination on the part of defendants, State's Attorney Berbling and investigator Shepard. They were charged with failure to file warrants or to prosecute eight white men who allegedly had threatened or assaulted some of the respondents. The complaint does not allege that any of the eight white men had ever been in court nor did it allege that any of the respondents had ever been arrested, tried or sentenced before these petitioners. Indeed, the complaint fails to allege that any specific individual had ever been arrested, tried or sentenced in the past and so fails completely in alleging any specific case against the two judges, petitioners herein.

The Court below (Appendix 2) said it must "consider all of the factual allegations to be true, resolving any doubts in Plaintiffs' favor." On Appendix 6 the Opinion states ". . . in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise every complaint against a state official by the simple expedient of averring conclusions would be cognizable in the federal courts. . . ." Yet, there was not a single factual averment as to trials or sentences in the past but only an apparent fear of discrimination against some-

one in the future. In addition, there were no averments whatever as to discrimination in setting bonds or requiring juries, yet the Court below on Appendix 21 states: "... it is clear that the complaint does state a cause of action against the judges under 42 U. S. C. §§ 1981, 1983 (and perhaps under 42 U. S. C. § 1982) since the judges are alleged to have imposed heavier fines and sentences and higher bails on plaintiffs' class than on the white citizens of Cairo."

On the basis of the record in this case—no specific charge of any past discrimination against anyone by either petitioner—the opinion of this Court in *Boyle* v. *Landry*, 401 U. S. 77 is very significant. On page 81 the Court said:

> "... the normal course of state criminal prosecution cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here."

The analogy of the two cases is shown by the statement on page 80 in the *Boyle* opinion:

> "Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute ..."

On page 81, this Court continued:

> "... the complaint contains no mention of any specific threat ..."

Since the lower court was clearly correct in stating "highly specific factual averments are required to defeat a motion to dismiss", it was clearly wrong in finding against these petitioners.

The complaint not only failed to make any specific charge of past discriminations by either petitioner against

anyone, but also failed to allege any relief had been sought against either petitioner by way of *habeas corpus* in the federal court or appellate review or otherwise under Illinois procedures available to them.

The Illinois Constitution provides unusually broad procedures to investigate any alleged improper conduct of judges.[7]

Under these constitutional provisions, anyone of the respondents could have filed a complaint had there been any improper conduct of either petitioner. Such a complaint would be investigated without cost to the complainer by this non-partisan board consisting of seven laymen and two judges. If the complaint had substance, proceedings to censure, suspend or remove the judge would be filed with the Courts Commission.

These constitutional provisions were designed to permit an early thorough investigation by an impartial board of any complaint that any judge had acted improperly. The complaint in this case not only failed to allege any specific act of alleged discrimination against either of these petitioners, but likewise failed to allege any federal court

7. The Constitution of Illinois in Article VI, Section 15, provides:

"(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party.

"(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute . . . The Board shall prosecute the complaint."

action by *habeas corpus* had been necessary, that any appeal in a state court had ever been taken, or that any complaint had ever been filed against either of these petitioners, either by any of the respondents or by anyone else who had been before them. The complete absence of any such allegations, indicates the complaint was truly based on "flimsy allegations" which did not warrant interference by a federal court.

While the federal courts have specifically stated that exhaustion of state remedies is not a prerequisite to federal involvement, *Carter* v. *Stanton*, 405 U. S. 669 (1972); *Sinclair* v. *Henderson*, 435 F. 2d 125 (5th Cir. 1970); *Moreno* v. *Henckel*, 431 F. 2d 1299 (5th Cir. 1970); *Little* v. *Schafer*, 319 F. Supp. 190 (D. C. Tex. 1970); however, cf. *Kostohryz* v. *Hursh*, 329 F. Supp. 319 (D. C. Minn. 1971) and *Moore* v. *Frazier*, 316 F. Supp. 318 (D. C. Neb. 1970), petitioners suggest that in light of the historic relationship of state and federal judiciaries, federalism would require that a balance be struck where a state such as Illinois provides ample methods for relief when discriminatory judicial conduct is alleged.

IV.

Members of Respondents' Class Have Suffered No Injury by Actions of Petitioners and Have No Standing to Seek Injunctive Relief.

Some members of respondents' class have specifically alleged instances of discrimination against State's Attorney Berbling and investigator Shepherd, yet none claim, allege, or infer that they have been before petitioners Spomer or O'Shea and have been discriminated against. While petitioners do not pass upon the possible sufficiency of the class as to Berbling and Shepherd, they submit that respondents have not satisfied Rule 23, Federal Rules of Civil Procedure, 28 U. S. C. Persons who desire to repre-

sent a class must be able to show injury to themselves and not merely that it might happen to someone else. *Kansas City, Mo.* v. *Williams,* 203 F. 2d 47 (8th Cir. 1953), certiorari denied 346 U. S. 826, *Anderson* v. *Kelly,* 32 F. R. D. 355 (D. C. Ga. 1963), *Conley* v. *Gibson,* 29 F. R. D. 519 (D. C. Tex. 1961), *Wilson* v. *Kelley,* 294 F. Supp. 1005 (D. C. Ga. 1968), affirmed 393 U. S. 266.

Were respondents' class permitted to seek injunctive relief as constituted in the Amended Complaint, the spectre of the inundation of the federal courts would loom large. As noted above, ever state court judge would be subject to federal injunctive proceedings instigated by an assortment of groups based upon their conception and interpretation of his record and temperament.

Reduced to basics, this Court is faced with the question, "Should a district judge order a prior restraint of future judicial discretion of a state judge upon unsworn allegations of the reputation of such judge?" We respectfully suggest that the district judge here properly denied such request, for the preservation of the salutory doctrine of judicial immunity in matters of judicial discretion, for the maintenance of respect for the state judiciary by litigants, and the proper handling of the enormous case load in the state courts.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment of the Seventh Circuit and the significant problems concerning the historical station of federalism and the judicial immunity doctrine.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

PEYTON BERBLING, ET AL.,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

BRIEF OF THE ILLINOIS JUDGES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1972.

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PEYTON BERBLING, ET AL.,
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vs.

EZELL LITTLETON, ET AL.,
Respondents.

BRIEF OF THE ILLINOIS JUDGES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Illinois Judges Association, as amicus curiae, respectfully requests that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit in the instant case.

CONSENT TO FILE.

Consent to file this brief amicus curiae has been granted in writing by petitioners and respondents. The letters of consent have been filed with the Office of the Clerk.

INTEREST OF AMICUS CURIAE.

The Illinois Judges Association is a voluntary organization of the judges of the courts of general jurisdiction in the State of Illinois. Its interest in the outcome of this litigation, which contemplates the subordination of state judges in the performance of their judicial duties to the supervision and control of federal judges, is obvious. For the decision below holds that the state judiciary is not a body of independent judges but rather is subordinate to the judges of the federal trial courts in the performance of their judicial tasks. While the decision of the Court of Appeals for the Seventh Circuit commands such supervision and control by injunction only with regard to the fixing of bail and the sentencing of guilty defendants, its rationale would support similar controls over every aspect of a state court judge's duties. The judgment below places in jeopardy the independence as judicial officers of every Illinois state court judge.

OPINIONS BELOW.

The opinion for the Court of Appeals for the Seventh Circuit is reported at 468 F. 2d 389. It is reproduced in the Appendix to the Petition for Certiorari. The opinion of the District Court for the Eastern District of Illinois is not reported. It is reproduced in the Appendix to the Petition for Certiorari.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Whether the decision of the Court of Appeals for the Seventh Circuit which places state court judges under

permanent injunction subject to the continuing supervision of the United States District Court with regard to all bail orders and criminal sentences:

1. Violates the rule of judicial immunity as stated by this Court in *Pierson* v. *Ray*, 386 U. S. 547 (1967)?

2. Violates the Guarantee of Republican Form of Government Clause of the United States Constitution, Art. IV, § 4?

3. Violates the decisions of this Court requiring lower federal courts to abstain from interference by injunction with the criminal law processes of a state?

4. Violates the requirements of this Court that injunctions against state criminal processes not issue on the basis of conclusory allegations at the behest of persons not affected by the actions of the state court judges sought to be enjoined?

STATEMENT.

This suit was brought by plaintiffs on behalf of an undefined class of which they were not members. As to the state court judges, petitioners here, the complaint alleges that they set bail for criminal defendants according to a predetermined schedule with the result that they discriminated against Negro defendants and that they imposed higher sentences upon convicted Negro defendants than upon convicted whites.

No plaintiff is alleged to have been among those charged and bailed or among those sentenced. No plaintiff is alleged to be threatened with the possibility of requiring bail or being subjected to sentence. Not a single instance of improper bail procedure or excessive sentence was asserted in the complaint. Indeed, there is nothing in the complaint to support the conclusory allegations of plaintiffs that

either they or any other members of the class were the victims of discrimination.

The District Court dismissed the complaint against the state court judges on the ground that judicial immunity protected them from a suit of this nature. The Court of Appeals for the Seventh Circuit, divided two to one, held that the Civil Rights Acts, now 42 U. S. C. §§ 1981-85, removed the judicial immunity that would otherwise exist.

The Court of Appeals put the issue this way: "Simply stated, that question raises to issue whether or not Congress, in passing these acts, intended to eliminate the doctrine of judicial immunity." (468 F. 2d at 396). Although this Court, in *Pierson* v. *Ray*, 386 U. S. 547 (1967), had canvassed the legislative history and concluded that it was not the intention or effect of the statutes to eliminate judicial immunity, the Court of Appeals for the Seventh Circuit, reviewing exactly the same legislative history, reached the opposite conclusion, because this case involved injunctive relief and *Pierson* was concerned with damages.

The Seventh Circuit concluded that a decree could be entered by the District Court directed to the judges of the Illinois courts: "We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's Attorney. An initial decree might set out the general tone of the rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and disposition of complaints. Nevertheless, we have complete confidence in the district court's ability to set up further guides as required and if necessary to consider individual decisions." (468 F. 2d at 414-15.) In short, these state courts were to be put into receivership, with review of their actions in this area to be undertaken by the federal district court.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Court of Appeals for the Seventh Circuit Is in Conflict with the Decision of This Court in Pierson v. Ray and in Conflict with Decisions of Other Circuits on the Important Question Whether Judicial Immunity Was Abolished by 42 U. S. C. §§ 1981-85 in Civil Rights Cases.

The Court of Appeals for the Seventh Circuit assumed that unless the Civil Rights Acts as codified in §§ 1981-85 of Title 42 abolished judicial immunity, the present action could not be maintained against the state court judges in this case. The question whether the Civil Rights Acts abolished the doctrine of judicial immunity was answered by this Court in *Pierson* v. *Ray*, 386 U. S. 547 (1967), in the negative. There is nothing in the legislative history or in this Court's opinion in *Pierson* to sustain the distinction upon which the Seventh Circuit based its conclusion: "when a class-discrimination is alleged, judicial officers may be enjoined." (468 F. 2d at 408.)

Nothing in the language of the debates affords a basis for the proposition that judicial immunity does not exist because the action purports to be a class action or because the action asks for the kind of relief sought and granted here. (There were fifteen plaintiffs in *Pierson*, enough to constitute a class, and there the class was identifiable and not merely speculative.) Reason and history support the conclusion that the distinction created by the Seventh Circuit is invalid. For this Court established, even before the classic *Bradley* v. *Fisher*, 13 Wall. 335 (1872), that the purpose of judicial immunity is to assure the independence of judicial judgment by precluding personal jeopardy of the judges who might err. The sanctions of contempt are at least as dangerous to that judicial independence as the risk

of a damage action. Under the decree proposed by the Court of Appeals in this case, if the district court concludes that any bail fixed or sentence imposed by a judge subject to the decree is discriminatory, the state court judge is in jeopardy not only of a jail sentence but also of a fine by way of civil of criminal contempt. He would no longer be exercising his own judgment in these matters, which is the function with which he is charged, he would be attempting to effectuate what he thought were the views of the federal district judge, lest he be met with sanctions at least as threatening as those precluded by this Court's judgment in *Pierson* v. *Ray*. It is hard to conceive a more stringent invasion of the state court's judicial functions.

The decree below also raises the serious constitutional question whether it is itself in violation of the Republican Form of Government Clause of the Constitution. Art. IV, §4. This point was made by the Court of Appeals for the Third Circuit sitting *en banc* in *Bauers* v. *Heisel*, 361 F. 2d 581. (CA 3d, 1966.) There, rejecting the notion that the Civil Rights Acts abolished judicial immunity, in a decision prior to *Pierson* v. *Ray*, the Third Circuit said:

> The statute before us also has no express declaration to that effect; nor does the legislative history support the conclusion that Congress intended to dissolve judicial immunity. These factors, when considered with the Supreme Court's determination that legislative immunity was not inimical to the purpose of the Act, lead to the inescapable conclusion that the act was not intended to be in derogation of the common law. (361 F. 2d at 587-88.)

It gave as an additional reason to support this conclusion, the avoidance of a serious constitutional question that would be created by the contrary result:

> Article 4, § 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican form of Government

> * * *." The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488, et seq., 494, et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various states, and consequently deprive them of a republican form of government. The language of the Supreme Court in Bradley v. Fisher, 80 U. S. (13 Wall.) 335, 347 . . . lends support to our conclusion. (361 F. 2d at 588.)

The decision of the Court of Appeals for the Seventh Circuit is predicated on the proposition that the Civil Rights Acts abrogated judicial immunity. It was this predicate that the Court of Appeals for the Third Circuit found violative of the Fourth Article of the Constitution.

In addition to being in conflict with the decision of this Court in *Pierson* v. *Ray*, and with the decision in *Bauers* v. *Heisel*, the decision of the Court of Appeals for the Seventh Circuit is in conflict with decisions of other Courts of Appeals, which have applied the doctrine of judicial immunity equally to injunctive actions and damage suits. Nor is there any suggestion in any of the other cases that class actions somehow call for special treatment. (Certainly, if class actions call for separate treatment in injunction suits, there is no reason why they should not also be an exception to the rule as to damages reiterated in *Pierson* v. *Ray*.) The essence of the rule of judicial immunity is the freedom of the judge from the threat of individual punishment in the event that a different court should disagree with his conclusion; it is unrelated to the nature of the suit brought, whether it be injunctive or damage action, whether it be individual or class action.

The opinion below is in conflict with those of several other Circuits which denied judicial immunity in injunctive actions. In *Gay* v. *Heller*, 252 F. 2d 313 (CA 5th, 1958),

the Fifth Circuit applied the rule of judicial immunity to a suit seeking both injunctive relief and damages. And in *Cade* v. *Carpenter*, 367 F. 2d 572 (CA 5th, 1966), the same court denied specific relief on the grounds that the complaint "fails to state a ground on which relief can be granted since the actions of the district judge are protected by the bar of judicial immunity." And in *Collins* v. *Moore*, 441 F. 2d 550 (CA 5th, 1971), the same court pointed out: "The proper means to correct an error in the proceedings against the defendant is by direct appeal or by writ of habeas corpus."

The Court of Appeals for the Second Circuit, in *Zuckerman* v. *Appellate Division*, 421 F. 2d 625 (CA 2d, 1970), in an action seeking declaratory and injunctive relief under the Civil Rights laws held that a court was not a "person" within the intendment of the statute. It went on to say: "In addition it has been held that 42 U. S. C. § 1983 does not affect the established common law rule that a judge is immune from a suit arising out of the exercise of his judicial powers." (421 F. 2d at 626, n. 2.) And, in *Gaito* v. *Ellenbogen*, 425 F. 2d 845 (CA 3d, 1970), the Court of Appeals for the Third Circuit denied injunctive relief on the ground of judicial immunity.

The Court of Appeals for the Sixth Circuit stated in *Kenney* v. *Fox*, 232 F. 2d 288, 292 (CA 6th, 1956), aff'g 132 F. Supp. 305 (WD Mich., 1955), where the relief sought was a declaratory judgment to void a judgment: "We are of firm opinion that the common law rule of immunity of a judicial officer for acts done in the exercise of his judicial function, where he has jurisdiction over both parties and the subject matter, has not been abrogated by the Civil Rights Act." So, too, the Eighth Circuit, in both *Tate* v. *Arnold*, 223 F. 2d 782 (CA 8th, 1955), and *Rhodes* v. *Houston*, 309 F. 2d 959 (CA 8th, 1962), aff'g 202 F. Supp. 624 (D. Neb., 1962), cases in which both damages

and injunctive relief were sought, ruled that judicial immunity was not erased by the Civil Rights Acts. And the Tenth Circuit, in *Gately* v. *Sutton*, 310 F. 2d 107 (CA 10th, 1962), where specific relief was sought under § 1983, upheld the rule of judicial immunity against a damage claim and asserted that the federal court had no power to issue mandamus "to direct state courts or their judicial officers in the performance of their duties. . . ."

The Court of Appeals for the Third Circuit, in *Robinson* v. *McCorkle*, 462 F. 2d 111, 113 (CA 3d, 1972), where the plaintiff sought damages and a declaration of unconstitutionality of a state law under which he was committed, held the doctrine of judicial immunity to be a bar: "The judicial immunity doctrine also sustains the dismissals. Assuming *arguendo* that Philip Robinson was committed under a repealed statute, such judicial miscue does not remove the shield of immunity. Judge Whipple properly pointed to the essential distinction between 'clear abuse of jurisdiction' and 'excess of jurisdiction.' . . . See also Marcedes v. Barrett, 453 F. 2d 391 (3d Cir. 1971), where a civil rights suit was filed against a battery of judicial personnel who performed judicial and quasi-judicial duties in connection with a state criminal proceeding. We affirmed the dismissal of the complaint on the bilateral grounds of judicial immunity and failure to allege specific facts in support of the conclusory allegations of the complaint."

Some federal district courts have reached the opposite conclusion. They have held that judicial immunity has been voided by the Civil Rights Acts in question here. See *Cassidy* v. *Ceci*, 320 F. Supp. 223 (E. D. Wis., 1970); *Rakes* v. *Coleman*, 318 F. Supp. 181 (E. D. Va., 1970); *Koen* v. *Long*, 302 F. Supp. 1383 (E. D. Mo., 1966); *United States* v. *Clark*, 249 F. Supp. 720 (S. D. Ala., 1965). These cases, however, but underline the importance of review by this Court of this question. Of all the Courts of Appeals, only

the Court of Appeals for the Seventh Circuit has come to the conclusion that the Civil Rights Acts have abrogated the doctrine of judicial immunity in injunctive actions.

II. The Decision of the Court of Appeals for the Seventh Circuit Is in Conflict with Decisions of This Court and Those of Other Circuits on the Question Whether a Civil Rights Suit May Be Predicated on Conclusory Allegations Unsupported by Facts.

It is to be noted that there is no allegation that any plaintiff suffered the wrongs alleged or, indeed, that any plaintiff was in danger of having such a wrong imposed on him. For the reasons set out in this Court's opinion in *Boyle* v. *Landry*, 401 U. S. 77 (1971), the Court of Appeals was clearly in error in imposing the injunction that it did here.

> It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. . . . There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner. As our holdings today in *Younger* v. *Harris*,

> [401 U. S. 37 (1971)], and *Samuels* v. *Mackell*, [401 U. S. 66 (1971)], show, the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here. (401 U. S. at 80-81.)

The language of this Court in *Boyle* v. *Landry* is applicable, *pari passu*, to the facts of the instant case. It is not surprising that *Boyle* v. *Landry* played no role in the opinion of the majority for the court below.

The totality of the amended complaint's allegations relating to the judicial defendants are merely conclusory and without any suggestion of factual basis. The charges were that:

> (a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that the defendant will appear in court when required, not that it be punishment, in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.
>
> (b) On information and belief they set sentences higher for plaintiffs and members of plaintiffs' class than for white persons and impose higher conditions.

A third equally nebulous charge was regarded by the Court of Appeals as removed from the case, since the Illinois courts are not allowed to exact jail penalties for failure to pay fines. 468 F. 2d at 393, n. 1.

Reference has already been made to the judgment of the Court of Appeals for the Third Circuit in *Robinson* v.

McCorkle, 462 F. 2d 111 (CA 3d, 1972). The decision below conflicts with the Third Circuit judgment not only on the issue of judicial immunity but on the question of sufficiency of the complaint as well. For, as the Third Circuit said in *Robinson:*

> Dismissal in favor of the judge, borough attorney and clerk, on the basis of the pleadings, cannot be faulted. Not only are the conspiracy allegations unsupported by any specific facts, but the complaint fails to make a sufficient showing under 42 U. S. C. 1985(3) that Philip Robinson was denied equal protection of the law. With near unanimity, the courts have rejected complaints containing mere conclusory allegations of deprivations of constitutional rights protected under § 1983(3). "A conspiracy claim based upon § 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals. Snowden v. Hughes, 321 U. S. 1 . . . (1944); Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959); Colon v. Grieco, 226 F. Supp. 414 (D. N. J. 1964); Selico v. Jackson, 201 F. Supp. 475 (S. D. Cal. 1962)." Daly v. Pedersen, 278 F. Supp. 88 (D. Minn. 1967); Weise v. Riesner, 318 F. Supp. 580, 583 (E. D. Wis. 1970). Cf. Griffin v. Breckenridge, 403 U. S. 88 . . . (1970). (462 F. 2d at 113.)

What the Third Circuit announced with reference to § 1985(3) is equally applicable to the other sections of the statute and the constitutional provisions under which plaintiffs sought to proceed here. See *Negrich* v. *Hohn*, 379 F. 2d 213 (CA 3d, 1967); *United States ex rel. Hoge* v. *Bolsinger*, 311 F. 2d 215 (CA 3d, 1962); *Marcedes* v. *Barrett*, 453 F. 2d 391 (CA 3d, 1971).

III. The Decision of the Court of Appeals for the Seventh Circuit Is in Conflict with Those of This Court and of Other Circuits on the Propriety of Federal Court Injunctions to Correct Judicial Errors by State Trial Courts.

Even if we assume that the complaint stated a claim of wrongdoing by the trial court judges in the instant case, the remedy afforded by the Court of Appeals for the Seventh Circuit is in conflict with the judgments of other circuits rejecting that remedy. In *Carter* v. *Duggan,* 455 F. 2d 1156 (CA 5th, 1972), where the plaintiff sought both damages and specific relief against judges of the state court, the Court of Appeals for the Fifth Circuit held: "With respect to his attempt to secure either trial or dismissal of the four cases pending against him, we think that it is clear that he has misconceived his remedy. The body vested with the power to compel lower courts to set pending cases for trial is the Supreme Court of Texas. . . ." The same circuit said in another suit in which it invoked the doctrine of judicial immunity, *Collins* v. *Moore,* 441 F. 2d 550, 551 (CA 5th, 1971): "The proper means to correct an error in the proceedings against a defendant is by direct appeal or by writ of habeas corpus." And the Sixth Circuit stated the same conclusion in still another judicial immunity case. In *Cuiksa* v. *City of Mansfield,* 250 F. 2d 700 (CA 6th, 1957), it ruled that appeal and not a collateral action was the proper means for correcting the alleged error of a trial court. So, too, in the instant case, the remedy of injunction is not an appropriate remedy; review by an Illinois appellate court is available for the correction of any such errors and to the extent that is not feasible, the extensive writ of habeas corpus, which does not place the individual judge in personal jeopardy or the state court in receivership, is the proper means.

This is the teaching of this Court as well. For the reasons that this Court refused removal in *Greenwood* v. *Peacock*, 384 U. S. 808 (1966), it is evident that injunctive relief should be denied here. There, petitioners were faced with prosecution—here there was no such showing—and sought removal of the cases to the federal courts on the grounds that petitioners were being prosecuted (1) because they were black; or (2) because they were aiding blacks in securing their rights; or (3) on the ground they could not secure a fair trial in the state court that had jurisdiction over them. This Court held that these were not adequate grounds for the federal court's interfering with the state judicial processes:

> It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicated by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel*, [384 U. S. 780]; *Strauder* v. *West Virginia*, 100 U. S. 303. (384 U. S. at 827-28.)

The decisions of this Court demonstrate, too, therefore, that if the plaintiffs here were ever to find themselves in

a situation in which they could establish the predicate of certain invasion of their civil rights claims by a state court, their remedy would not be the blanket injunction sought in this case, but removal of those cases in which that predicate could be established, in accordance with this Court's ruling in *Georgia* v. *Rachel,* 384 U. S. 780 (1966).

IV. The Decision of the Court of Appeals for the Seventh Circuit Is Inconsistent with the Controlling Authorities Established by This Court Requiring Federal Judicial Abstention from Interference with the Processes of State Criminal Courts.

Research reveals to us no injunction directed to state courts of the breadth and consequences of the injunction that the Seventh Circuit would impose on the state judges in this case. The required reporting to the federal district court by the state courts of all its bail decisions and all its criminal sentencing so that the federal district court may approve or disapprove the state court judge's exercise of his functions is unprecedented. The Seventh Circuit itself drew the analogy to a district court's oversight of "railroad reorganizations," (468 F. 2d at 415), so that the state judge becomes the equivalent of the receiver in bankruptcy, an officer of the federal court and subject to its control. Such drastic interference with the functions of the state court is totally inconsistent with the rules long since established by this Court requiring abstention from interference with the functions of the state judiciary in criminal cases. The principle of non-interference in the sovereign authorities of the state judiciary underlies this Court's decisions in *Pierson* v. *Ray* and *Greenwood* v. *Peacock.* More recent expressions of this concern by this Court are to be found in *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Perez* v. *Ledesma,* 401 U. S. 82 (1971).

The principles so clearly enunciated by the Court in *Younger* v. *Harris* have never been so blatantly violated as by the Court of Appeals in its decision below. In *Younger*, Mr. Justice Black stated for the Court:

> **This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of a "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.**
>
> **This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. . . . (401 U. S. at 44-45.)**

Clearly the Constitution, with its concepts of federalism, does not permit what the Court of Appeals here ordained. State courts are not subordinate to and subject to the control of federal district courts. They are not and cannot constitutionally be made adjuncts of the federal trial courts. And they certainly should not be so subordinated at the instance of individuals who have not been harmed or endangered by the actions of a state court and show no basis on which they are even threatened with such harm and such danger. If state criminal processes can be made into the equivalent of corporate reorganization procedures, at the instance of a nonexistent class of which the plaintiffs are not members, the destruction of "Our Federalism" is complete. Nothing in our jurisprudence suggests a precedent for such gross invasion by the federal judiciary of the role of state courts as the Seventh Circuit has commanded here.

CONCLUSION.

Because the opinion of the Court of Appeals for the Seventh Circuit commands the subordination of the state judiciary to the control of the federal district court in a way that contradicts the rulings of this Court and is in conflict with the opinions of other Courts of Appeals, the Amicus Curiae respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 72-953

MICHAEL O'SHEA AND DOROTHY SPOMER,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-955

W. C. SPOMER,
Petitioner,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-1107

PEYTON BERBLING AND EARL A. SHEPHERD, JR.,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

Respondents, individually and on behalf of the class of persons specified in the amended complaint, file this brief

in opposition to the several petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Littleton* v. *Berbling*, 468 F. 2d 389 (7th Cir. 1972). The opinion of the District Court for the Eastern District of Illinois is not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. On November 3, 1972 petitioners Dorothy Spomer and Michael O'Shea filed with the Court of Appeals a Motion for Recall and Stay of the Mandate pending a petition for certiorari in this Court. The motion was denied on November 7, 1972. Petitioners Peyton Berbling and Earl A. Shepherd, Jr. did not file a similar motion. On November 22, 1972, petitioners Dorothy Spomer and Michael O'Shea filed an Application for Stay of Mandate of United States Court of Appeals for the Seventh Circuit with the Honorable William H. Rehnquist. The application was granted on November 28, 1972. That application was subsequently referred to the Court and granted on December 11, 1972. On December 13, 1972 petitioners Peyton Berbling and Earl A. Shepherd, Jr. filed an Application for Stay of Mandate of United States Court of Appeals for the Seventh Circuit with the Honorable William H. Rehnquist. The application was denied on December 19, 1972. On January 9, 1973 respondents filed with the Honorable William H. Rehnquist their Application for Extension of Time to File Brief in Opposition to Petition for Writ of Certiorari to and including March 12, 1973 so that they could file a single brief in response to the several petitions. This application was granted on

January 12, 1973. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a federal court has the authority under the Civil Rights Act to enjoin state judges, a state's attorney, and an investigator from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice?

2. Whether the doctrines of judicial and quasi-judicial immunity bar an action under the Civil Rights Act seeking equitable relief?

3. Whether the doctrine of quasi-judicial immunity cloaks a state's attorney with immunity from an action in damages when he engages in racial discrimination in the exercise of his office?

4. Whether the doctrine of quasi-judicial immunity applies to an investigator, employed by the Office of State's Attorney, who engages in racial discrimination?

5. Whether the amended complaint adequately states claims under the Civil Rights Act?

STATEMENT OF THE CASE.

Respondents brought this action under 42 U. S. C. §§ 1981, 1982, 1983 and 1985 (hereinafter referred to as the "Civil Rights Act") and 28 U. S. C. § 1343(3) and (4) on behalf of themselves and black persons of the City of Cairo, Illinois against the petitioners who, as public officials administering criminal justice in Alexander County, systematically discriminate against them and members of their class on the basis of race. The racial discrimination, it is alleged, has a chilling effect on respondents' exercise of their right to assemble peaceably. The constitutional rights

invaded are the First, Eighth, Thirteenth and Fourteenth Amendments.

Petitioners filed motions to dismiss the amended complaint. The district court on March 23, 1971 dismissed respondents' claims for injunctive relief on the ground of lack of jurisdiction and dismissed respondents' claims against petitioners Berbling and Shepherd for damages on the ground that the doctrine of quasi-judicial immunity bars relief. The Court of Appeals for the Seventh Circuit, on October 6, 1972, reversed the district court's decision.

The petitioners are: Dorothy Spomer and Michael O'Shea, associate judges, of the Circuit Court for Alexander County; Peyton Berbling, state's attorney for Alexander County when this case was filed; W. C. Spomer, the current state's attorney for Alexander County; Earl A. Shepherd, Jr., an investigator, not a lawyer, employed by the Office of State's Attorney.

Respondents seek equitable relief against each of the petitioners and damages against Berbling and Shepherd.

The amended complaint alleges that since the early 1960's black persons of the City of Cairo, Illinois have been actively seeking equal opportunity and treatment in such areas as employment, housing, education and ordinary day-to-day relations with white persons and officials of Cairo. In furtherance of this equality quest, respondents and members of their class encourage others to engage in an economic boycott of local merchants who engage in racial discrimination. This equality quest generated and continues to generate substantial antagonism from not only the public officials in Cairo but also the white persons. The amended complaint charges that petitioners' discriminatory administration of criminal justice inhibits respondents' exercise of their right to assemble peaceably.

Spomer and O'Shea Conduct.

Spomer and O'Shea, as judges, engage in a pattern and practice of racial discrimination[1] against respondents and members of their class as follows: They set bond in criminal cases by following an unofficial bond schedule applicable to black persons without regard to the facts of the case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require black persons, when charged with violations of City ordinances, to pay for a trial by jury, yet do not require other persons to pay for a trial by jury.[2]

Berbling Conduct.

Berbling engages in a pattern and practice of racial discrimination in the exercise of his office by refusing to permit black persons to give evidence of criminal conduct committed by white persons against black persons. He refuses to initiate criminal proceedings against white persons arising out of assaults and batteries committed by them against black persons. He refuses to proceed on black person's complaints by information. He interrogates black persons before the grand jury with the purposeful intent of depriving the black persons of their right to present their evidence to the grand jury. In some instances before the grand jury he declines to interrogate the black com-

1. It is also alleged that their discrimination is based upon economic status. The effect insofar as the right to injunctive relief is concerned is the same. *See Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

2. In Illinois, a defendant has a right to a trial by jury in such cases, even if the penalty is a fine and not a jail sentence. Ill. Const., Art. 1, § 13.

plainants at all. When white persons are prosecuted on the basis of complaints by respondents, Berbling engages in a practice of inadequately prosecuting in order to lose the cases or to settle them on terms more favorable than those accorded black persons. He engages in the practice of recommending greater bonds and sentences in cases involving black persons than those of white persons. He engages in a practice of bringing significantly more serious charges against black persons for conduct which would result in no charge or a minor charge against white persons.

All of the alleged practices assertedly carried on by Berbling are willful and malicious with an intent to deprive respondents of their right to give evidence against those who threaten their security, peace and tranquility and to deprive respondents of their right to hold property to the same extent as is enjoyed by white persons and to deter respondents from engaging in a peaceful boycott and other activities protected by the First Amendment.

The amended complaint describes a number of specific examples illustrative of the complained of conduct.

After the Court of Appeals for the Seventh Circuit reversed the lower court decision, W. C. Spomer succeeded Berbling as State's Attorney and accordingly Spomer was automatically substituted as a party to the extent the cause affects the Office of State's Attorney of Alexander County as provided under Rule 48(3) of this Court. Respondents seek only equitable relief against petitioner W. C. Spomer. Because the amended complaint asks relief against Berbling in his individual as well as his official capacity, he remains a party in interest in this action.

Shepherd Conduct.

Shepherd as an investigator engages in a pattern and practice of racially discriminatory conduct in that he re-

fuses to permit respondents to give evidence against white persons respecting acts threatening their personal safety. For example, on August 10, 1970, Shepherd refused to permit respondent Hazel James, a black woman, to file criminal charges against Raymond Hurst, a white man, who kicked her in the stomach on August 8, 1970 while she peacefully demonstrated against the racially discriminatory practices of merchants and public officials. His refusal was based on the fact that Hazel James is a black person.

Shepherd and Berbling Conduct.

Shepherd and Berbling, in conspiracy, engaged in a practice of discriminatory conduct in that together they prevented respondents, because of their race, from giving evidence against white persons respecting acts threatening their personal safety.

Petitioners urge that the amended complaint does not allege that any of the plaintiffs has been a victim of their discrimination. A careful review of the amended complaint, however, refutes their contention, as noted by the Seventh Circuit. Paragraph 1 of the amended complaint provides that respondents and members of their class have been deprived by all petitioners of certain enumerated rights guaranteed by the Constitution and laws of the United States. Paragraph 3 of the amended complaint provides that respondents are members of the class on whose behalf the action is brought in addition to having brought the action individually. Paragraphs 35 and 36 of the amended complaint provide that the actions of O'Shea and Spomer, as judges, have deprived and continue to deprive respondents and members of their class of rights guaranteed by the Constitution and laws of the United States. In Paragraphs 37 and 38, it is alleged that each of the practices referred to in the amended com-

plaint is carried out with the intent to deprive "plaintiffs and members of their class of the benefit of the criminal justice system of Alexander County" and that each of such practices is carried out with the "intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States". The amended complaint is reproduced in the Appendix to respondents' brief in opposition to the petitions for a writ of certiorari.

ARGUMENT.

I. A federal court has the authority under the Civil Rights Act to enjoin state judges, a state's attorney and an investigator from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice.

The decisions of this Court sustain the position of the Court of Appeals for the Seventh Circuit that state judges, a state's attorney, and an investigator are not immune from the equitable powers of a federal court under the Civil Rights Act. The thrust of the civil rights statutes, which were enacted to implement the Fourteenth Amendment to eradicate the vestiges of slavery from American society, is crystal clear. They provide a mechanism whereby the federal system may intervene when a citizen is deprived of rights guaranteed to all, irrespective of race. *See Bell* v. *Hood*, 327 U. S. 678 (1946); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). No person, irrespective of his official position, may, by design or otherwise, subject a citizen to a deprivation of any rights secured by the Constitution or laws of the United States. *See Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The fact that Spomer and O'Shea are judges, Berbling and W. C. Spomer are

state's attorneys, and Shepherd is an investigator in a state's attorney's office does not relieve them of their fealty to the Constitution and laws of the United States. *United States* v. *McLeod*, 385 F. 2d 734, 738 n.3 (5th Cir. 1967); *Ill. Rev. Stat.*, ch. 37 § 72.2 (1969); *Ill. Rev. Stat.*, ch. 14 § 1(1969). The petitioners stand in this litigation as instrumentalities of the State and thus are bound to abide by the strictures of the Constitution and laws of the United States. *Cooper* v. *Aaron*, 358 U. S. 1, 16-18 (1958).

In *Mitchum* v. *Foster*, 407 U. S. 225, 92 S. Ct. 2151 (1972), this Court stated that the Civil Rights Act fundamentally altered the federal system. As a result of the constitutional amendments and statutes passed subsequent to the Civil War,

> "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
>
> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, whether that action be executive, legislative, or *judicial*.'" (Emphasis in original.) *Id.* at 2160-61.

In *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958), this Court stated:

> "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by *state legislators or state executives or judicial officers*, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" (Emphasis added.)

These principles, indeed, were enunciated by the Court almost a century ago. In 1880, in *Ex parte Virginia*, 100 U.S. 339, 347, this Court stated:

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Id.*

The decision of the Seventh Circuit is not in conflict with this Court's decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967). In *Pierson*, the Court was concerned with an action for damages, not one for equitable relief, against a state judge. Moreover, the record in *Pierson*, unlike here, was "barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners when their cases came before this Court." *Id.* 553. In the subject case it is alleged that the petitioners are engaging in a pattern and practice of racial discrimination and that they are not merely exercising discretion within the bounds of the Constitution and laws of the United States.

The Seventh Circuit decision, moreover, is consistent with decisions of other circuits. *See, e.g., Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969); *Shaw* v. *Garrison*, 467 F. 2d 113 (5th Cir. 1972), *cert. denied*, 92 S. Ct. 1253

(1972); *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968); *Bramlett* v. *Peterson*, 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969). In general, the cases cited by petitioners are not inconsistent with these decisions. Their cases either relate to actions in damages against judges or do not involve situations of a pattern and practice of racial discrimination.

In sum this is not a case in which a federal district court is asked merely to substitute its judgment for the judgment of state judges, a state's attorney, or an investigator arising out of discretionary action in an isolated case by a disgruntled litigant. This is not a case in which injunctive relief would constitute an unwarranted intrusion into the operation of the state judiciary or office of state's attorney. Rather, this is a case in which Spomer and O'Shea, as judges, Berbling (and W. C. Spomer as his successor) as state's attorney, and Shepherd, as an investigator, use their official positions to engage in a systematic pattern of discrimination whereby persons, because of their race, are treated in a manner different from others. When state officials pervert their office by acting in such fashion in violation of the Constitution and laws of the United States, they have acted outside their judicial and quasi-judicial capacity and may be enjoined by a federal court. The exclusion of black persons from the benefits of citizenship is not within the limits of their discretion. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151-2 (1970). Under these allegations, the amended complaint meets not only the standards for federal involvement under *Mitchum, supra*, but also those espoused in *Younger* v. *Harris*, 401 U. S. 37 (1971), and its companion cases. *See also Hadnott* v. *Amos*, 393 U. S. 815 (1968) and *Hadnott* v. *Amos*, 394 U. S. 358 (1969).

II. The doctrine of quasi-judicial immunity does not cloak a state's attorney from an action for damages when he engages in racial discrimination in the exercise of his office.

The Court of Appeals held that a prosecutor is not cloaked with absolute immunity from suits for damages. When he acts outside of his jurisdiction or when he engages in duties analogous to that of policemen, such as the investigation of crimes, immunity does not apply. This decision is consistent with decisions of other circuits and with analogous decisions of this Court .

Because respondents seek long denied constitutional rights by demonstrating on the public ways against local public officials and merchants, they repeatedly are victims of assaults and batteries committed by white persons. Whether it be by reason of prejudice, neglect or otherwise, Berbling as the instrumentality of the state, who had knowledge of this criminal violence, made no effort to bring the guilty to punishment or afford protection or redress to the outraged and victimized. Berbling was unwilling to enforce state criminal laws when the victims were black persons and the accused were white persons. He consistently and repeatedly refused to take evidence of criminal conduct and turned a deaf ear to complaints of black persons; he refused to investigate their complaints; he refused to initiate criminal proceedings against their assailants; he refused to present appropriate evidence to the grand jury. The direct consequence of Berbling's policy was to deny respondents, because of their race, access to the criminal justice system for the resolution of grievances.

It is long established that when a public official acts outside of his quasi-judicial capacity, he is not immune from a claim for damages. Racial discrimination in the conduct

of an office is prohibited by the Constitution of the United States and the statutes of the State of Illinois. The exclusion of black persons and those actively supporting them from the benefits of the criminal justice system, because of their race, was not within Berbling's discretion. A state's attorney has a mandatory, non-discretionary and ministerial duty to exercise his office in a non-discriminatory manner. When he fails to so conduct his office, he acts outside his quasi-judicial capacity and is, therefore, personally liable for the consequences of his non-protected conduct. *See Ex parte Virginia,* 100 U. S. 339 (1880).

Additionally, the doctrine of quasi-judicial immunity does not extend to many of the duties of a state's attorney. Berbling is charged with refusing to take complaints from black persons, with refusing to investigate criminal conduct of whites against blacks, with refusing to present evidence of such criminal conduct to the grand jury, and with refusing to recommend bail and sentence without regard to race. In this respect his function is analogous to that of an investigator or policeman, and thus he is not immune from liability. When Berbling deprived respondents of access to the judicial system by his refusal to take evidence of white criminal conduct, he stood in no different a position than the prison warden who deprived a prisoner access to the courts. *See Johnson* v. *Avery,* 393 U. S. 483 (1969). When Berbling refused to gather evidence of white criminal conduct he stood in no different a position than the police officer who unlawfully carried out an investigation. *See Monroe* v. *Pape,* 365 U. S. 167 (1961).

The decision of the Seventh Circuit is consistent with decisions of other circuits. In *Lewis* v. *Brautigam,* 227 F. 2d 124 (5th Cir. 1955), the Fifth Circuit held that a state's attorney who ordered two deputy sheriffs to force the plaintiff to be photographed in convict garb at a state prison and to plead guilty could be liable for damages under Sec-

tions 1983 and 1985. In *Robichaud* v. *Ronan,* 351 F. 2d 533 (9th Cir. 1965), the Ninth Circuit held that a complaint stated a civil rights claim for damages against the prosecuting attorneys for prosecuting plaintiff on a murder charge with malicious motive and without probable cause. The complaint alleged that plaintiff had been arrested and confined for 25 days without a preliminary hearing. Efforts were made to extract a confession from him. The court stated:

> "Section 1983 . . . was intended to provide a remedy to persons subjected to '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, . . .' [citing cases]. Thus, if immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds and the reason for the immunity, the statute becomes subject to circumvention, if not emasculation." *Id.* at 536.

In upholding the complaint, the court said:

> "'[P]rosecutors are not immune from suit under the Act simply as a matter of status wholly without regard to the nature of their conduct.'"
>
> • • • • •
>
> "The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process." *Id.* at 537-38.

In *Hilliard* v. *Williams,* 465 F. 2d 1212 (6th Cir. 1972), *cert. denied,* ..... U. S. ....., 93 S. Ct. 461 (1972), the Sixth Circuit held that deliberate suppression of favorable evidence by a prosecuting attorney in violation of plaintiff's constitutional rights was an act outside his quasi-judicial capacity and beyond the scope of "duties constituting an integral part of the judicial process". The Sixth Circuit reversed the district court's dismissal of plaintiff's com-

plaint, stating that a prosecuting attorney was not immune from liability in damages if plaintiff proved the allegations of her complaint.

Other cases which have held that a prosecuting attorney may be liable in damages under Sections 1983 and 1985 include *Johnson* v. *Crumlish*, 224 F. Supp. 22 (E. D. Pa. 1963), and *Madison* v. *Purdy*, 410 F. 2d 99 (5th Cir. 1969).

The cases cited by petitioner Berbling, although applying immunity to some factual situations, are distinguishable from the subject case in that they do not involve actions for damages arising out of racial discrimination.

This is not a case that demands, for policy reasons, protection of an officer who exercised his best judgment and abided his oath to uphold the Constitution. This is far from the type of case brought by a bitter defendant claiming that his civil rights were violated by a state's attorney's abuse of discretion in the course of litigation. Above all, this is not a case of intermittent and sporadic activity open to criticism but not to liability. The conduct charged was an official, determined and willful program of refusing to take evidence of white criminal conduct when the victims were black persons, to bring the guilty to punishment, and to afford equal protection and standing that no one has a right to impair. In *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), this Court stated:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

III. The doctrine of quasi-judicial immunity does not apply to an investigator employed by a state's attorney.

Shepherd is an investigator who is employed by the Office of State's Attorney. He is not an assistant state's attorney nor is he a lawyer. His sole purpose is to investigate. His duties consist of interviewing witnesses, taking complaints and making investigations. The decision of the Seventh Circuit that Shepherd, as an investigator, is not entitled to immunity is consistent with decisions of this Court and courts of other circuits. His function is in the nature of a policeman-detective and as such he is not entitled to quasi-judicial immunity from damage actions. His sole defense is that of good faith, just as a policeman has a defense of good faith. Shepherd's failure to perform his affirmative, non-discriminatory duty to take evidence of criminal conduct of white persons against black victims constitutes both a willful and wanton omission in violation of the civil rights statutes and is a denial of equal protection of the laws. *See Monroe* v. *Pape*, 365 U. S. 167 (1961); *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971); *Madison* v. *Purdy*, 410 F. 2d 99 (5th Cir. 1969).

IV. The amended complaint adequately states claims under the Civil Rights Act.

In finding that respondents' amended complaint states claims under the Civil Rights Act,[3] the Seventh Circuit followed established law that in appraising its sufficiency it must follow "the accepted rule that a complaint should not

3. The court thought that, in order to warrant the removal of the cloak of immunity from liability of Berbling and Shepherd for damages, the amended complaint might be more specific in alleging that the complained of conduct is outside quasi-judicial activity. The court, however, stated that that determination should be left to the district court and, if adverse to respondents, respondents should be permitted to amend their complaint.

be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitled him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); *see also Lucarell* v. *McNair*, 453 F. 2d 836, 838 (6th Cir. 1972); *Scher* v. *Board of Educ. of West Orange*, 424 F. 2d 741, 744 (3rd Cir. 1970). Mere vagueness or lack of detail is not a ground for a motion to dismiss. Rule 8(f) of the Federal Rules of Civil Procedure provides that "all pleadings shall be so construed as to do substantial justice." If they thought the amended complaint were vague, petitioners could have availed themselves of Rule 12(e) and moved for a more definite statement. 2A Moore, Federal Practice, § 12.08. They did not so move.

This Court, as did the Seventh Circuit, must assume, on a motion to dismiss, that the allegations of the amended complaint are true and construe the allegations liberally, resolving any doubts in favor of the respondents. *See Boddie* v. *Connecticut*, 401 U. S. 371, 373 (1971); *Contract Buyers League* v. *F & F Investment*, 300 F. Supp. 210, 214 (N. D. Ill. 1969), *aff'd sub nom* 420 F. 2d 1191 (7th Cir. 1970), *cert. denied*, 400 U. S. 821 (1970); *Jung* v. *K. & D. Mining Co.*, 260 F. 2d 607, 608 (7th Cir. 1958).

CONCLUSION.

For the foregoing reasons, respondents urge the Court to deny the petitions for a writ of certiorari.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his Father and Next Friend, HOBERT LAMBERT, MORRIS GARRETT, by his Father and Next Friend, LEVI GARRETT, individually and as representatives of a class,

Plaintiffs,

vs.

PEYTON BERBLING, individually and as State's Attorney for Alexander County, Illinois, EARL SHEPHERD, individually and as investigator for PEYTON BERBLING, CARL MEISENHEIMER, as Police Commissioner of the City of Cairo, Illinois, MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois, and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Defendants.

Civil Action No. 70-103

Equitable Relief Requested

AMENDED COMPLAINT.

Plaintiffs, Ezell Littleton, Manker Harris, James Wilson, Carl Hampton, Hazel James, Walter Garrett, Charles

Koen, Frank Washington, Curtis Johnson, Cheryl Garrett, Yvonda Taylor, Russell Deberry, Robert Martin, Preston Ewing, Jr., James Brown, Herman Whitfield, Wallace Whitfield, Leroy Lambert, by his father and next friend, Hobert Lambert, Morris Garrett, by his father and next friend, Levi Garrett, individually and as representatives of a class, by their attorneys, Martha Jenkins, James B. O'Shaughnessy and Alan M. Wiseman, complain of defendants, Peyton Berbling, individually and as State's Attorney for Alexander County, Illinois, Earl Sheperd, individually and as investigator for Peyton Berbling, Carl Meisenheimer, as Police Commissioner of the City of Cairo, Illinois, Michael O'Shea, as Magistrate of the Circuit Court for Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois. Plaintiffs state as follows:

1. This is a civil-action under Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985 for damages and for preliminary and permanent injunctions and other equitable relief, to enjoin the deprivation under color of law, custom and usage of Alexander County and the City of Cairo, Illinois, of plaintiffs and members of their class rights, privileges and immunities guaranteed by the First, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U. S. C. Sections 1981, 1982, 1983, and 1985.

2. Jurisdiction is conferred on this Court by Title 28 U. S. C. Sections 1331 and 1343.

3(a) Plaintiffs are black citizens of the City of Cairo, Illinois, with the exception of plaintiffs Manker Harris and James Brown, who are white citizens of the City of Cairo, Illlinois.

(b) They bring this action as a class action, individually

and on behalf of all other persons similarly situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

4(a) Plaintiffs are financially poor persons.

(b) They bring this action as a class action, individually and on behalf of all other persons similarily situated in the City of Cairo, Illinois.

(c) The class includes all those who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases.

5. As to said classes of persons:

(a) They are so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims of plaintiffs are typical of the claims of the class; (d) plaintiffs will fairly and adequately protect the interests of the class; and (e) defendants have acted and refuse to act on grounds generally applicable to the classes, thereby making appropriate final relief with respect to the class as a whole.

6(a) Defendant Berbling is, and was at all times mentioned herein, the State's Attorney for Alexander County, Illinois and a citizen and resident of that County.

(b) As State's Attorney he is the chief prosecuting attorney for said county.

(c) He has authority to determine when criminal complaints may be filed and warrants issued, whether and how

to prosecute violations of state statutes, what the charges should be against accused persons, and also to recommend dismissals and reductions of charges, length of sentences, and the terms thereof.

(d) On information and belief defendant Berbling may also recommend the amount of bond and whether a convicted defendant should pay costs.

7. Defendant Meisenheimer is, and was at all times mentioned herein, a Police Commissioner of the City of Cairo, and a citizen of the City of Cairo, Illinois. As such he supervises the activities of the Cairo Police Department.

8(a) Defendant O'Shea is, and was at all times mentioned herein, the Magistrate for the Circuit Court of Alexander County, Illinois and a citizen of that County. As such, he has the authority to set bond for all persons charged with crime either under state law or city ordinance. He also has the authority to handle preliminary hearings, trials of ordinance violations and misdemeanors. In each of such cases, he determines the outcome and, in the case of ordinances and misdemeanors, the sentence to be imposed.

(b) Defendant Spomer is, and was at all times mentioned herein, the Associate Circuit Judge for Alexander County, Illinois, and a citizen of that county. As such, she has the authority to act in all criminal matters in Alexander County.

9. Defendant Earl Shepherd, is, and was at all times mentioned herein, employed by the Office of the State's Attorney as an investigator and assistant to defendant Berbling, and a citizen of Alexander County, Illinois.

FIRST CLAIM FOR RELIEF.

10. Since the early 1960's black citizens of Cairo, Illinois, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation in governmental decision making and in ordinary day-to-day relations with white citizens and officials of Cairo. As an important part of their protest, plaintiffs have participated in and encouraged others to participate in an economic boycott of merchants of the City of Cairo who plaintiffs consider have engaged in racial discrimination.

11. This active and lawful seeking after long overdue constitutional rights has generated and continues to generate a great deal of tension and antagonism from the white citizens and officials of Cairo.

12. As is hereinafter set forth more fully, defendant Berbling has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and the right to be free from the vestiges of slavery as secured by the Thirteenth Amendment and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

13. Defendant Berbling, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color

of state law and authority, deprives plaintiffs of rights and privileges as citizens of the United States by neglecting to provide for their personal safety, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety and property and by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety and property, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably and their right to hold property to the same extent as is enjoyed by white citizens.

14. Defendant Berbling has denied and continues to deny to plaintiffs and members of their classes as described in paragraphs 3 and 4 herein of their constitutional rights in the following ways:

(a) It has been and continues to be the practice of defendant to refuse to initiate criminal proceedings and to refuse to hear criminal charges against members of the white race upon the complaints of members of the plaintiffs' class and to deprive plaintiffs of their right to give evidence affecting their security, for example:

(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal

charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to intimidate his family in order to prevent James Wilson from holding property.

(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

(7) In May, 1969, plaintiff Ewing and eight others could have and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures.

(b) It has been and continues to be the practice of defendant Berbling in those instances where complaints

have been filed by black persons against white persons involving misdemeanors to submit such to a grand jury, rather than proceed by information or complaint, and to interrogate complainants and witnesses before the grand jury with a purposeful intent to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example: Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than question him regarding the incident, asked him such questions as "did you get paid for picketing?" A no-true bill was returned by the grand jury.

(c) It has been and continues to be the practice of defendant Berbling, in those instances where complaints have been filed by black persons against white persons involving misdemeanors, to submit such to a grand jury, rather than proceed by information or complaint, and, in some instances, fail to interrogate at all the complainant and witnesses respecting the incident, purposefully intending to discriminate upon the basis of race and creed, thereby depriving plaintiffs and members of their class of their right to give evidence affecting their security and thereby chill their exercise of their right to assemble peaceably, for example:

(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter

Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers arrived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo. A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident.

(d) It has been and continues to be the practice of defendant Berbling in the few criminal proceedings he has instituted against white persons at the behest of plaintiffs to inadequately prosecute the cases in order to lose or to settle them on terms more favorable than those against blacks;

(e) It has been and continues to be the practice of defendant Berbling to request or recommend, in cases involving plaintiffs and members of their class, substantially greater bonds and sentences than requested or recommended in cases involving white persons;

(f) It has been and continues to be the practice of defendant Berbling to charge plaintiffs and members of

their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person.

(g) Defendant Berbling has sought to deprive plaintiffs of their right to give evidence respecting the security of members of their class by seeking the dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which defendant would drop pending criminal charges against several of the plaintiffs.

15. Each of said practices is carried out wilfully and maliciously with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County and to deprive plaintiffs and members of their class of the right to give evidence against those who threaten their security, peace, and tranquility and the right to hold property as enjoyed by white citizens.

16. Each of said practices is carried out wilfully and maliciously with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

17. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, viz., Sections 1981, 1982 and 1983 of Title 42, United States Code.

18. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendant as hereinabove set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff classes will suffer irreparable harm.

WHEREFORE, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constitutional rights in the manner set forth in paragraphs 13 and 14 of this complaint, and that defendant be required to submit a monthly report to this Court concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class.

2. Defendant be preliminarily and permanently enjoined from neglecting his duties of office in failing to interrogate impartially and without discrimination witnesses before the grand jury.

3. Defendant be preliminarily and permanently enjoined from requesting more severe bond and sentences for plaintiffs and members of their class than for white persons;

4. Defendant be preliminarily and permanently enjoined from setting more severe charges against plaintiffs and members of their class than for white persons;

5. This Court maintain continuing jurisdiction in this action;

6. Grant to plaintiffs their costs and reasonable attorneys' fees; and

7. Grant such other relief as to the Court may seem just and proper.

SECOND CLAIM FOR RELIEF.

19. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6 and 10-17.

20. Each of the named plaintiffs suffered humiliation, despair, frustration, great anxiety, and physical distress as a result of the practices of defendant alleged in paragraphs

12-14, and in particular by defendant's refusal to permit plaintiffs to initiate criminal proceedings, to give evidence, and to benefit from laws protecting their security to the same extent as white citizens.

WHEREFORE, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This court grant such other rellief as may be just and proper.

THIRD CLAIM FOR RELIEF.

21. Plaintiffs reallege the allegations of paragraphs 1-3, 5-6, 9-13 and 15-16.

22. Defendant Berbling in conspiracy with defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprived plaintiffs of rights and privileges as citizens of the United States, as follows:

(a) Defendants Berbling and Shepherd have conspired to deprive plaintiffs of equal protection of the laws by neglecting to provide for their personal safety, because of their race, although knowing of the possibility of racial disorders, by refusing to prosecute those who threaten plaintiffs' safety.

(b) Defendants Berbling and Shepherd have conspired to prevent plaintiffs from giving evidence against white persons respecting acts threatening their personal safety with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment

right to assemble peaceably. For example, on Saturday, August 8, 1970, plaintiff Hazel James was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo pursuant to a boycott when she was kicked in the stomach by one Raymond Hurst. Plaintiff James was rushed to a hospital for treatment of the injury sustained. On Monday, August 10, 1970, plaintiff James sought to file a complaint, but defendant Shepherd, at defendant Berbling's directions, refused to allow it.

23. Such practices are carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983 and 1985 of Title 42, United States Code.

WHEREFORE, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FOURTH CLAIM FOR RELIEF.

24. Plaintiffs reallege the allegations of paragraphs 1-3, 5, 9-11, 15-17 and 20.

25. Defendant Shepherd has engaged in, and continues to engage in, a pattern and practice of conduct under color of law, custom and usage of Alexander County, Illinois, which has deprived and continues to deprive plaintiffs and

members of their class of their rights to due process of law and the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982 and 1983 of Title 42, United States Code.

26. Defendant Shepherd, with a purpose of depriving plaintiffs of equal protection of the laws or equal privileges and immunities under the law, with a purposeful intent to discriminate upon the basis of race and creed, under color of state law and authority, deprives plaintiffs of rights and privileges as citizens of the United States by refusing to permit plaintiffs to give evidence against white persons respecting acts threatening their personal safety, with the design to intimidate plaintiffs so as to chill their exercise of the First Amendment right to assemble peaceably; for example:

On August 18, 1970, defendant Shepherd refused to permit plaintiff Hazel James to file criminal charges against one Raymond Hurst, a white man, who, on August 8, 1970, had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo.

WHEREFORE, plaintiffs respectfully pray that:

1. This Court grant to each of them damages in the amount of $1,000 as compensatory damages and $1,500 as punitive damages.

2. This Court award plaintiffs their costs and reasonable attorneys fees; and

3. This Court grant such other relief as may be just and proper.

FIFTH CLAIM FOR RELIEF.

27. Plaintiffs reallege the allegations in paragraphs 1-3, 5, 7 and 10-11.

28. As hereinafter set forth more fully, defendant Meisenheimer has engaged in, and continues to engage in, a pattern and practice of conduct, under color of law, custom and usage of the City of Cairo, Illinois, in the enforcement of criminal justice in said city, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States and of rights secured by laws of the United States, *viz.*, Sections 1981, 1982, 1983, 1985 and 1986, Title 42, United States Code.

29. Defendant Meisenheimer has denied and continues to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harrassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.

(b) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the facts and is far more severe than like charges would be against a white person.

30. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

31. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

32. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

33. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

WHEREFORE, plaintiffs respectfully pray that:

1. Defendant be preliminarily and permanently enjoined from depriving plaintiffs and members of the plaintiff class of their constiutional rights in the manner set forth in paragraph 29 of this complaint, and that defendants be required to submit a monthly report to this Court concerning the nature, status and details of each arrest of and each charge filed against plaintiffs or members of plaintiff class in which the Police Department of the City of Cairo was involved in any way;

2. This Court maintain continuing jurisdiction in this action;

3. Grant to plaintiffs their costs and reasonable attorneys fees; and

4. Grant such other relief as to the Court may seem just and proper.

SIXTH CLAIM FOR RELIEF.

34. Plaintiffs reallege the allegations in paragraphs 1-5 and 8 and 10-11.

35. As hereinafter set forth more fully, defendants O'Shea and Spomer have engaged in and continue to engage in, a pattern and practice of conduct, under color of law, custom and usage of Alexander County, Illinois, in the administration of criminal justice in said county, all of which has deprived and continues to deprive plaintiffs and members of their class of their rights to due process of law and to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

36. Defendants O'Shea and Spomer have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways:

(a) They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment, in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(b) On information and belief they set sentences higher for plaintiffs and members of plaintiffs' class than for white persons and impose harsher conditions.

(c) It is the custom and practice of defendants O'Shea and Spomer to require plaintiffs and members of their class when charged with violations of city ordinances which carry fines and possible jail penalties if the fine cannot be paid, to pay for a trial by jury, all in violation of their rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

37. Each of said practices is carried out with intent to deprive plaintiffs and members of their class of the benefits of the criminal justice system of Alexander County.

38. Each of said practices is carried out with intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States.

39. Each of said practices is carried out in violation of the rights of plaintiffs and their class under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

40. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights by defendants as herein set forth. Unless this Court issues an injunction as prayed for, plaintiffs and the plaintiff class will suffer irreparable harm.

WHEREFORE, plaintiffs respectfully pray that:

1. Defendants be preliminarily and permanently enjoined from depriving plaintiffs and members of their class of their constitutional rights in the manner set forth in paragraph 36.

2. Grant to plaintiffs their costs and attorneys fees herein; and

3. Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

/s/ JAMES B. O'SHAUGHNESSY,
James B. O'Shaughnessy,

/s/ ALAN M. WISEMAN,
Alan M. Wiseman.

SCHIFF HARDIN WAITE
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APPENDIX B.

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U. S. Const. amend. XIII:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend XIV:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> • • • • •
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U. S. C. § 1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • • •
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985:

§ 1985(2) ". . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Ill. Const., Art. 1, § 13:

The right of trial by jury as heretofore enjoyed shall remain inviolate.

Ill. Rev. Stat., ch. 14 § 1:

Before entering upon the respective duties of their office, the attorney general and state's attorneys shall each be commissioned by the governor, and shall take the following oath or affirmation:

I do solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States and the Constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general (or state's attorney, as the case may be), according to the best of my ability.

Ill. Rev. Stat., ch. 37 § 72.2:

> . . . The several judges of the circuit courts of this State, before entering upon the duties of their office, shall take and subscribe the following oath or affirmation, which shall be filed in the office of the Secretary of State:
>
> I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of judge of ..... court, according to the best of my ability.

Supreme Court, U. S.
FILED
MAY 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, ET AL.,

Petitioners,

vs.

EZELL LITTLETON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 468 F. 2d 389 and appears in full in the Appendix to the Petition for Certiorari (A1). The Opinion of the District Court for the Eastern District of Illinois is not reported and appears in full in the Appendix to the Petition for Certiorari (A1).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction was invoked under 28 U. S. C. § 1254(1). The Petition for Writ of Certiorari was filed on January 3, 1973, and granted on April 2, 1973.

CONSTITUTIONAL PROVISIONS.

Article IV, Section 4 of the Constitution of the United States provides in pertinent part:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

STATUTORY PROVISIONS.

Sections 1981, 1982, 1983 and 1985 of 42 U. S. C. appear in full in the Appendix to the Petition for Certiorari (A1), pp. 61-63.

QUESTIONS PRESENTED.

1. Whether a state court judge or other state officer holding a constitutional office, is subject to interference or regulation by a United States district court merely because he holds a state office, especially in the absence of any specific allegations or proof of discrimination on his part?
2. Whether an alleged class, made up of both blacks and whites has any standing to enjoin a state court judge where there is no allegation that any member of the alleged class had ever been before the judge or suffered any discrimination at his hands and where the complaint alleged only that they speculated he might sentence blacks to longer sentences than whites?
3. Whether a class may maintain an action for mandatory injunction against a state court judge for an alleged

past discriminatory predisposition upon a complaint which alleges only general and conclusory allegations and evidences no instance of such conduct?

4. Whether the common law doctrine providing for judicial immunity for judicial acts in the exercise of legal discretion was abolished by Congressional civil rights enactments in instances in which mandatory injunctive relief is sought?

5. Whether the decision of the Court of Appeals for the Seventh Circuit which places state court judges under permanent injunction as to all bail orders and criminal sentences, destroys the constitutional basis of the federal-state relationship and transcends this Court's ruling in *Pierson* v. *Ray*, 386 U. S. 547 (1967), so as to violate the Guaranty of Republican Form of Government Clause of the United States Constitution, Art. IV, § 4?

6. Whether the decision of the Seventh Circuit which places state judges under permanent injunction, subject to the supervision of the United States district court with regard to all bail orders and criminal sentences, violates the decisions of this Court requiring lower federal courts to abstain from interference by injunction with the criminal law processes of a state?

7. Whether in view of the historic comity relationship between federal and state judicial systems, a federal district judge may establish guidelines to control the exercise of lawful state judicial discretion in future criminal matters based upon a civil suit in equity generally alleging a past discriminatory predisposition to that class?

STATEMENT OF THE CASE.

This civil rights suit was brought by plaintiffs on behalf of an undefined class, of which they were not members, charging that defendants Michael O'Shea, as Magistrate of the Circuit Court of Alexander County, Illinois, and Dorothy Spomer, as Associate Circuit Judge for Alexander County, Illinois, systematically discriminate against members of their class on the basis of race. This action, brought under the aegis of 42 U. S. C. §§ 1981, 1982, 1983, and 1985 and alleged interference with plaintiffs' First, Sixth, Eighth, Thirteenth and Fourteenth Amendment rights, sought mandatory injunctive relief against O'Shea and Spomer in their official capacity as members of the Illinois judiciary.

The Amended Complaint in the first, second, third, and fourth claims for relief set out eleven specific acts of alleged discriminatory conduct on the part of defendant State's Attorney Berbling[1] and investigator Shepherd.[2] The sixth claim for relief comprises general and conclusory allegations of "pattern[s] and practice[s] of [discrimina-

1. State's Attorney Berbling was succeeded in that office by W. C. Spomer.

2. Original defendants, State's Attorney Berbling and investigator Shepherd, the only defendants against whom specific charges of misconduct were made, are not parties in the case now before this Court. Motions made by those two defendants for a stay of mandate were denied by this Court, and their petition for a writ of certiorari, filed in Case No. 72-1107, was taken under advisement. In any event the only parties against whom specific charges of discrimination were made are not parties in this proceeding.

The complaint in the case below recited eleven specific acts of alleged discrimination on the part of defendants, State's Attorney Berbling and investigator Shepherd. They were charged with failure to file warrants or to prosecute eight named white men who allegedly, on specific dates and at specific places, had threatened or assaulted some of the respondents. No other specific charges were made against any defendant.

tory] conduct", apparently devised as a substitute for the requirement of pleading with specificity.

The alleged conduct includes the following allegations: (a) the judges involved set bond in criminal cases by following an unofficial bond schedule without regard to the facts of the case or circumstances of an individual defendant, (b) they sentence black persons to longer criminal terms and impose harsher conditions than they do with respect to white persons who are charged with the same or equivalent criminal conduct, and (c) they require plaintiffs and members of their class to pay for a trial by jury when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid (A2, 30 par's. 36(a), (b), (c)).

Though the Amended Complaint alleges in paragraph 36(b) that O'Shea and Spomer sentence black persons to longer terms and impose harsher conditions than for white persons similarly charged, *the Complaint does not mention a single instance of such conduct in the past nor does it charge that any sentences were not within the judges' lawful discretion.* Indeed, no plaintiff is alleged to have been among those charged, bailed or sentenced. Furthermore, no plaintiff is alleged to be threatened with the possibility of requiring bail or being subjected to sentence. Plaintiffs do not set forth any facts or allege a single instance of improper bail procedure or excessive sentence in the Amended Complaint. Moreover, no other allegation in plaintiffs' capacious Amended Complaint evidences or supports the conclusory allegations in the Sixth Claim for Relief. (A2, 30-3)

The plaintiffs additionally do not indicate any request for relief either by *habeas corpus* or appellate review which has been made by any member of their class or *by anyone else* for any past judicial discrimination by either

Spomer or O'Shea. In the absence of any specificity as to alleged past conduct it can only be surmised that the language used in the complaint expresses a conjectural apprehension of possible discrimination in the future, not grounded upon any facts. This is borne out by the prayer for relief which asks to enjoin the judges "from depriving plaintiffs of their constitutional rights as set forth in paragraph 36".

The allegations regarding the setting of bonds and the payment for jury trials do not state that respondents are treated differently than any other persons. It is merely averred in general terms that petitioners follow an unofficial bond schedule in criminal cases; no charge is made, as has been done with respect to sentencing practices, that there exists discrimination in the treatment of white and black persons.[3] In addition, the Court of Appeals itself expressed doubt as to the meaning of the allegation concerning the payment for jury trials. (See footnote 1, page 5, of the Court's Opinion (A1, 6)). In sum, the sole issue as drawn by the pleadings relates only to allegation (b) above, i.e. a judge's discretionary role in imposing sentence on a lawfully convicted defendant. The complaint is completely barren of any factual averment involving judges and contains only one allegation of discrimination by judges—that in paragraph 36(b) of the Amended Complaint, which is alleged only on information and belief.

The District Court dismissed the Complaint on March 23, 1971, on the grounds that (1) it lacked jurisdiction to entertain a cause seeking to have a federal court substitute its judgment for the judgment of the state judiciary, and (2) in the regular performance of judicial officers' duties, judicial immunity barred relief in an action under the Civil

3. Respondent's Brief in Opposition misquotes the record by stating that the judges followed "an unofficial bond schedule applicable to black persons". No such charge appears in either the original Complaint or Amended Complaint.

Rights Act. (A copy of the District Court's opinion is set forth in the Appendix to the Petition for Certiorari (A1, pp. 56-60).) On October 6, 1972, the Court of Appeals, in a two to one decision, reversed the judgment of the District Court, and ruled that a federal district court may entertain actions requiring federal supervision and regulation by mandatory injunction over the discretion which state court judges may lawfully exercise within the limits of authority granted to them by law. The Court of Appeals held that: (1) the Complaint stated a cause of action against these petitioners cognizable under 42 U. S. C. §§ 1981, 1983 (and perhaps § 1982), and (2) the doctrine of judicial immunity did not extend to defendants in light of the legislative history of the Civil Rights Acts of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, 1871, Ch. 22, 17 Stat. 13) where injunctive relief is sought.

The Seventh Circuit, recognizing that its holding created a case of first impression, volunteered guidelines which the federal district court might follow in imposing upon state judges a system of reporting their conduct and disposition of their cases to the district court. The Court said:

> We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's Attorney. An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints. Nevertheless, we have complete confidence in the district court's ability to set up further guides as required and if necessary to consider individual decisions. (A1, 46).

The opinion is reproduced in the Appendix to the Petition for Certiorari (A1, pp. 1-55).

SUMMARY OF ARGUMENT.

The plaintiffs, consisting of 17 black persons and 2 whites, allege that they have been denied their civil rights under 42 U. S. C. §§ 1981-5 at the hands of defendant Illinois state judges, although no plaintiff or any member of the class has ever been before those judges in a judical proceeding. The record presently before this Court does not support a judgment against these state court judges, and plainly reveals plaintiffs' lack of standing.

The Complaint requests the District Court to enjoin these members of the Illinois judiciary from discriminating in a future case, based upon the nebulous and conclusory statement that they "engage in a pattern and practice" of discriminatory conduct.

The salutary doctrine of judicial immunity obviates all civil liability sought against members of the judiciary. This concept is well founded in the jurisprudential history of the United States. Defendant judges are no less intimidated by an action for injunctive relief in the District Court than they would be in a damage action suit to impose liability for a judicial act. Subjecting state judges to equitable proceedings in the District Court in Section 1983 actions, would be to chill judicial discretion and independence at the state level and place the state judicial system in receivership.

ARGUMENT.

Judges Michael O'Shea and Dorothy Spomer, the defendants herein, respectfully pray that the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on October 6, 1972, be reversed, at least insofar as these defendants are

concerned. In support of said prayer, defendants respectfully submit the following comments and arguments.

I.

Under Our Dual System of Federal and State Courts, the Proper and Independent Functioning of a State Court Judge Is Assured by the Principles of Comity, Federalism and Mutual Respect. Under Those Doctrines, a State Court Judge, in the Exercise of His Discretionary Powers, Is Not Subject to Interference and Regulation Merely Because He Holds a State Office or Because Someone May Speculate That in the Future He Might Engage in Discriminatory Conduct Against Some Unknown and Unnamed Individual. Under Those Principles, the Record Here Does Not Support the Judgment Against These Defendants.

At the outset, it should be noted that the record now before this Court in Cases No. 72-953 and 72-955, set for argument in tandem, has an entirely different posture than the record in this proceeding when considered by the court below.

As pointed out in the Statement of the Case, the Amended Complaint, in four separate claims, named as defendants, State's Attorney Berbling and his investigator Shepard; one claim was directed against the present defendant judges in the same Illinois county.

Eleven specific acts of alleged discrimination on the part of defendants Berbling and Shepard referred to the supposed failure to file warrants or to prosecute eight named white men who allegedly, on specific dates and at specific places, had threatened or assaulted some of the plaintiffs. The Complaint, however, did not contain a single specific charge against either of the judges, but only general and conclusory allegations.

As noted also in the Statement of the Case, defendants Berbling and Shepherd, the only defendants against whom

specific charges of misconduct had been made, are not parties to this proceeding, since their petition for writ of certiorari, in Case No. 72-1107, was taken under advisement by this Court.

The only persons presently before this Court are the two judges, petitioners in No. 72-953, and W. C. Spomer in No. 72-955. Petitioner W. C. Spomer was elected in November 1972 as State's Attorney to replace the defendant Berbling. Spomer, of course, was not named in the original action; he had no official capacity as a state officer when the alleged misconduct occurred, and, insofar as this record is concerned, never performed an official act or been subject to the slightest charge of discrimination. Unless he is subject to regulation solely because he is an elected state officer, succeeding a state officer against whom charges had been made, there is no possible basis on which the judgment below could apply to him.

Plaintiffs, however, assert on page 6 of their Brief in Opposition to the petition filed by W. C. Spomer as Case No. 72-955 that he is subject to regulation merely because he is now a state officer. On page 6, that Brief states: "Spomer was automatically substituted as a party to the extent the cause affects the Office of State's Attorney . . . Respondents seek only equitable relief against the petitioner W. C. Spomer". Equitable relief cannot be ordered against a state office, but only against individuals themselves guilty of misconduct. The original complaint on which the judgment was rendered was drawn on that theory and alleged the defendants had individually been guilty of specific acts of misconduct, or as to the judges, that it was speculated they had a predisposition to discriminate. Plaintiffs now blandly state that if *any* state's attorney was charged with discrimination, his successor, merely because he holds the same state office, is subject to equitable regulation, without any allegations or proof that he had

ever done anything wrong or even thought of doing anything wrong.

On this record the judgment below is equally inapplicable to these judges as defendants. As noted in the Statement of the Case, the only charge alleging discrimination (despite the misquotation by respondents)[4] was in Paragraph 36(b), alleging that these judges sentence black persons to longer terms and impose harsher conditions than they do with respect to white persons similarly charged. The complaint does not mention a single instance of such conduct in the past nor does it charge that any sentences given to anyone were not within the defendants' lawful discretion. Even that sentencing allegation was made only on information and belief.

The complaint does not allege that any of the eight whites allegedly favored by Berbling or Shepherd had ever been in court before either of these defendants nor does it allege that any of the plaintiffs had ever been arrested, admitted to bail, tried or sentenced before these judges. Indeed, the complaint fails to allege that any specific individual had ever been arrested, tried or sentenced in the past. Thus it fails completely in alleging any specific facts against the two judges.

The Court below (AI, 2) said it must "consider all of the factual allegations to be true, resolving any doubts in Plaintiffs' favor". On page 6 of the Appendix I the opinion states ". . . in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise every complaint against a state official by the simple expedient of averring conclusions would be cognizable in the federal courts. . . ." Yet, there was not a single factual averment as to trials or sentences in the

4. On page 5, Respondents' Brief in Opposition misquotes the record by stating the judges followed "an unofficial bond schedule applicable to black persons." No such charge appears in the complaint.

past but only what amounted to a request that the court enjoin the conjectural possibility of discrimination against someone in the future. In addition, there were no averments whatever as to discrimination in setting bonds or requiring juries.

This Court said in *Boyle* v. *Landry*, 401 U. S. 77 at 81 (1971):

> . . . **the normal course of state criminal prosecution cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future.** The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here. [Emphasis Added.]

These words apply with equal force to the case at hand. As far as these defendants are concerned, the generalized allegations in the complaint never reach the level of specific factual averments and are nothing more than flimsy, contrived "speculation about the future."

A further comparison between the *Boyle* case and the situation presented here is revealing. This Court said in *Boyle* (401 U. S. 77 at 80):

> Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute . . .

On page 81, this Court continued:

> . . . the complaint contains no mention of any specific threat . . .

Exactly the same is true in the present case as far as the judges are concerned.

It seems clear that the court below in its zeal to find against Berbling and Shepherd on the basis of the documented charges made against them, apparently on the theory of "guilt by association", entered a similar judg-

ment against the judges, although on its own test there were no "highly specific factual averments" directed against them.[5]

That the plaintiffs rely solely on "speculation about the future"—expressly barred by this Court, in *Boyle* v. *Landry, supra,*—is shown by the amazing statement on page 11 of their Brief in Opposition that ". . . Berbling (and W. C. Spomer as his successor) as state's attorney . . . *use* their official positions to engage in a systematic pattern of discrimination. (Emphasis added.)

This attack on W. C. Spomer, newly elected State's Attorney and petitioner in 72-955, is characteristic. It demonstrates the display of feelings, not facts. According to plaintiffs, any state official in the area, though he has just taken office and not even performed a single official act, is *a priori* suspect; it is presumed, without the slightest factual basis, that he will engage in acts of discrimination in the future. It is respectfully submitted that such conjectural clairvoyance is no substitute for facts and cannot possibly form the foundation for the regulation of the state official's future conduct by an equity court. Were it otherwise, the most primitive principles of justice and equity jurisprudence would be violated.

State judges and state's attorneys are sworn to uphold the law. When it is contended that some state law is invalid, action is available to prevent its enforcement. Yet, state judges and state's attorneys are not subject to regulation by the federal courts merely because they hold a state office

5. See also *Robinson* v. *McCorkle,* 462 F. 2d 111 (3rd Cir., 1972) where the Court held that such allegations must be specific and there must be a "clear showing of invidious, purposeful and intentional discrimination between classes or individuals." (citing cases.) This requirement has been applied to the other areas of the Civil Rights Act: see: e.g., *Negrich* v. *Hohn,* 379 F. 2d 213 (3rd Cir., 1967); *Mercedes* v. *Barrett,* 453 F. 2d 391 (3rd Cir. 1971); *United States ex rel. Hoge* v. *Bolsinger,* 211 F. Supp. 199, 201 (W. D. Pa. 1962), aff'd 311 F. 2d 215 (3rd Cir. 1962), cert. denied 372 U. S. 931 (1963).

and someone speculates that they may possibly act in violation of their oath and duty at some time in the future.

It should be mentioned in this connection that the Illinois Constitution provides unusually broad procedures to investigate any alleged improper conduct of judges.[6]

Under these constitutional provisions, anyone of the plaintiffs could have filed a complaint had there been any improper conduct of either of these judges. Such a complaint would be investigated without cost to the complainant by a non-partisan board consisting of seven laymen and two judges. If the complaint had substance, proceedings to censure, suspend or remove the judge would be filed with the Courts Commission.

These constitutional provisions were designed to permit an early thorough investigation by an impartial board of any complaint that a judge had acted improperly. The complaint in this case not only failed to allege any specific act of alleged discrimination against either of these defendants, but likewise failed to allege that any federal court action by *habeas corpus* had become necessary, that any appeal in a state court had ever been taken, or that any

6. The Constitution of Illinois in Article VI, Section 15, provides, in part:

> (b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party.
>
> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute . . . The Board shall prosecute the complaint.

complaint had ever been filed against either of these judges either by any of the plaintiffs or by anyone else who had appeared before them in their official capacity. The complete absence of any such allegations indicates that the complaint was truly based on "flimsy allegations" which did not warrant interference by a federal court.

Under these circumstances it is respectfully submitted that no possible equitable relief may be granted against these judges, necessitating thereby as to them a reversal of the judgment of the Court of Appeals, apart and aside from the principles of judicial immunity, as interpreted by this Court.

II.

Members of the Alleged Class Have Suffered No Injury by Actions of Either Judge, and, Hence Have No Standing in Court.

Some members of plaintiffs' class have specifically alleged instances of discrimination against State's Attorney Berbling and investigator Shepherd, yet none of them has claimed, alleged or inferred that he or she has been before Judges Spomer or O'Shea and has been subjected to discrimination. While these defendants do not wish to engage in a discussion regarding the possible sufficiency of the class in relation to Berbling (now W. C. Spomer) and Shepherd, they do submit that plaintiffs have not fulfilled the requirements of a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure; hence, they have no standing to maintain the present action against the judges herein. Persons who desire to represent a class must be able to show injury to themselves, and not injury that might eventually befall someone else. *Kansas City, Mo.* v. *Williams,* 203 F. 2d 47 (8th Cir. 1953), cert. den. 346 U. S. 826; *Anderson* v. *Kelly,* 32 F. R. D. 355 (D. C. Ga. 1963); *Conley* v. *Gibson,* 29 F. R. D. 519 (D. C. Tex. 1961);

and *Wilson* v. *Kelley*, 294 F. Supp. 1005 (D. C. Ga. 1968), affd. 393 U. S. 266. No such injury was shown to have been suffered by any member of the class; the class which they allegedly represent must be gauged by the same yardstick *and* criterion of lack of direct injury.

In *Sierra Club* v. *Morton*, 405 U. S. 727, 31 L. Ed. 636 (1972), this Court has held that a suit for declaratory and injunctive relief may not be maintained if the person suing claims merely a "special interest" in the action and does not show that he himself has suffered or will suffer any injury, economic or otherwise. There the Sierra Club, a nationwide conservationist group, sought to enjoin federal officials from approving an extensive skiing resort development in Mineral King Valley. Holding that the group had no standing to seek relief, this Court declared that the requirement of injury did serve "as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." (31 L. Ed. 2d at 646) Indeed, that goal would be undermined if the Administrative Procedure Act were construed to authorize judicial review "at the behest of organizations or individuals who seek to do no more than vindicate their own preferences through the judicial process." (31 L. Ed. 2d at 646) This Court also referred in a footnote (footnote 16, 405 U. S. at 31 L. Ed. 2d at 646) to de Tocqueville's observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury. (1 Democracy in America 280 (Alfred A. Knopf, 1945).)

Although these statements were made with respect to a case which was viewed in the light of the provisions of the Administrative Procedure Act, the principles enunciated there have general application and are determinative in every instance in which a plaintiff's standing is contested

before a judicial tribunal. Unless a plaintiff has suffered a direct injury, he has no standing to complain of a defendant's conduct. Here the plaintiffs complain, with respect to the judges, of conjectural conduct which never might occur. Indeed, all that can be hypothesized from the complaint against these judges is a desire to have the federal court provide binding guidelines for these state judges commanding them how to proceed *in the event* that any of the class might commit a criminal offense in the future and appear before those judges. Yet, that possibility, built upon the abstruse idea that the plaintiffs will engage in criminal activities at some future time, cannot give them the legal standing to assert a present right. Discarding change-of-venue procedures, habeas corpus, or appellate review if such presumed eventualities might ever materialize, the stark fact remains that at the present time under the existing posture of the record, plaintiffs have not suffered any injury from the hands of the judges, and therefore, are asking the federal court in effect for an advisory opinion whether that court believes that the judges involved might engage in discriminatory acts against someone in the future. Thus no present actual controversy exists between these parties. It is therefore respectfully submitted that plaintiffs' claim for an adjudication of speculative, hypothetical situations, is highly improper and not maintainable.

III.

The Common Law Doctrine Providing Civil Judicial Immunity for Judicial Acts Was Not Abolished by Congresisonal Civil Rights Enactments, Regardless of Whether Damages or Mandatory Injunctive Relief Is Sought.

A.

The Decision Below Permits the Intimidation of State Court Judges and Deprives the State of an Independent and Intellectually Free Judicial System.

In reliance upon what it conceived to be an historical imperative, the Seventh Circuit has held that a federal district court may entertain actions against state judges for permanent injunctions under 42 U. S. C. §§ 1981-5 which require supervision and regulation by the district court. That decision places before this Court the task of accommodating two important jurisprudential principles now on a collision course—the necessity of vindicating Article III jurisdiction, 42 U. S. C. § 1983, and the necessity of maintaining a harmonious federal-state relationship. Forming the backdrop of any such accommodation is the "brooding omnipresence" of a principle that antedates our Constitution but which has remained as an integral part of our historical and judicial heritage: the desirability of a judiciary that is intellectually independent and totally free from intimidation in the exercise of its judicial function.

The reasoning in the old case of *Bradley* v. *Fisher*, 13 Wall. 335, 80 U. S. 649, 650 (1871) is no less potent today as it was at the time of its decision:

> . . . For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself.

> Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. *Taaffe* v. *Downes,* 3 Moore, P. C. 41, n.
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> * * * * *
>
> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. . . .[7]
>
> * * * * *
>
> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

The sanctions of contempt are as dangerous to judicial independence as the risk of a suit for money damages. One cannot visualize a more dramatic example of judicial (subordination) bondage than the spectacle of having a state judge (circuit, appellate, or supreme) dragged into a fed-

7. Lord Coke in 1608 reported the case of *Floyd* v. *Barker* (12 Coke 25) where the court held that judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, lest such charges would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations."

eral district court on a claim for injunction, put to the ignominy of having to sit on the witness stand, defend the integrity of his character and actions, and be subjected on cross-examination to the verbal onslaught of a class of people who had never been before him at any time.[8] While on that federal stand, the state judge would be compelled to recall his past decisions and the reasoning behind those decisions; for, in an instance like the present one, a judge may not only be on trial with respect to an individual case, but for "patterns and practices" which comprise within their purview many decisions, extending through a number of years.

The effect of the decision of the Seventh Circuit will be to "chill" judicial discretion in the dispensation of justice in the State of Illinois; in effect, then, a state judge will have to "look over his shoulder" each time he exercises his judicial discretion for fear that by some nebulous standard of statistical analysis he has not meted out "justice" in accordance with a federal district judge's personal formula. In addition, a state judge would be more likely to qualify or balance sentences or amounts of bail, not in accordance with what the circumstances may have warranted, but out of the nagging fear that leniency or strictness (irrespective of whether deserved) over a period of time would be interpreted as deliberate discriminatory conduct.

Subjecting a state judge to federal review each time a dissatisfied but lawfully convicted defendant alleges class discrimination would require federal courts to conduct an evidentiary hearing to determine whether a pattern of discrimination existed. A judge operating under an abstruse

8. If, however, the case on federal review were an individual one, it is conceivable that the state judge would be confronted by a prisoner *in propria persona*, who had been sentenced to jail by the judge.

order not to discriminate in fixing bonds and sentencing would find himself confronted with the possibility of a federal contempt citation and the necessity to defend his motivation in each case. The burden on the federal system would be, in the least, cumbersome, and severe. The effect on the state system would be to create an oppressive atmosphere of federal supervision, cf., *Greenwood* v. *Peacock*, 384 U. S. 808 (1966), and render it oftentimes impotent.

The action countenanced by the court below will result in the federal courts sitting not only in review of state discretionary decisions but also as appellate tribunals passing ultimate judgment on state criminal proceedings. Though the action sanctioned here is civil, it requires the review of past *criminal* decisions. In addition, the likelihood is great that similar class actions would be taken to the district courts from state criminal actions on the grounds that the judge will or has a propensity to discriminate against a particular group. The result, then, would be to exchange state remedies[9] in favor of district court review.

In effect, then, the Seventh Circuit's position leads to the egregious result that any group (whether injured or not) may seek an injunction in federal court against a state judge[10], who in the group's opinion, has a past record of antipathetical inclination towards its members. Therefore, it is not too remote to propose that a group e.g. Mexican-American citizens, Italian-American citizens, Jewish citizens, Puerto Rican citizens, Irish-American citizens, white-Anglo-Saxon-American citizens, *ad infinitum*, could also compel a state judge to defend his discretionary past conduct before a federal district judge. In addition, it is

9. e.g. change of venue, appellate review, removal (See Argument p. 14, n. 6).

10. Assuming *arguendo* that judicial immunity no longer exists, then the horrendous prospect that *federal* judges would be subject to the same recriminations is totally probable.

not too remote to propose that minority judges would suffer the same fate based upon an alleged record of a predisposition toward another group. Extending the possibilities sanctioned by the Court below to its most absurd result, a state court judge could literally spend so much time defending his actions in frivolous suits at the federal bar that he could not perform his state judicial duties! See, especially, *Greenwood* v. *Peacock*, 384 U. S. 808 at 832 (1966).

It must be noted that the decision of the Court of Appeals for the Seventh Circuit does not limit its holding primarily to lower state court judges. Indeed, the application of the Seventh Circuit's decision renders *all*[11] state judges subject to injunctive relief should some class allege that they have engaged in "patterns and practices" which they feel violate their civil rights. Therefore, this decision, if it is allowed to remain in effect, could easily propel a rash of federal injunctive proceedings against a state appellate court based upon the naked allegation that the appellate justices (or any combination of them) engage in "patterns and practices of conduct" inimical to the civil rights of a particular class!

The unfitting burial given to the judicial immunity doctrine by the Seventh Circuit irrevocably alters the historic relationship that existed (1) between courts of equity and law, (2) between federal and state courts, and (3) between the judge and those persons appearing before him. The effect of permitting actions against the state judiciary, growing out of the exercise of lawful judicial discretion, would be to irreparably harm the administration of criminal justice at the state level.

Conspicuously, the Court of Appeals did not limit its decision to the particular facts at bar. Instead, it proffers

11. *"All"* includes federal and state judges, for, the abolition of the immunity doctrine renders *every* judge subject to intimidation and harassment.

a doctrine which extends to classes in all cases. This is best exemplified by an instance in which a group of persons decides that a particular judge has established a "pattern and practice" of conduct in e.g. commercial cases, or tort actions, which in light of the group's analysis constitutes discriminatory conduct. Indeed, the scope of the Seventh Circuit's decision exposes the determinations of *all* judges in *all* situations to federal injunctive review.

Defendant judges submit that no intellectually independent state judiciary could survive in an atmosphere of hostile litigants and constant federal supervision.

B.

There Is No Historical Basis for the Abolition of Judicial Immunity.

Holding that the venerable doctrine of judicial immunity did not extend to state judicial members in instances in which injunctive relief is sought, the Court of Appeals selectively recounted the history of the Civil Rights Act of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, 1871; ch. 22, 17 Stat. 13) (AI, pp. 12-16 and 17-20) as it appears substantially in *Monroe* v. *Pape*, 365 U. S. 167 (1961). The Court of Appeals surmised that the words "any person" in § 2 of the Civil Rights Act of 1866 seemed to include state judges and that in considering criminal sanctions Congress clearly had decided to eliminate judicial immunity (AI, 14). Yet, in reviewing the debates in their entirety it becomes clear that Congress became rent with discord on that subject. At least as far as state judges are concerned, the debates concentrated upon the issue whether a state court judge could be held criminally liable for the enforcement of state statutes which were discriminatory. The Court below even cited the comments of Illinois Senator Trumbull, the bill's principal sponsor, wherein he stated:

> . . . I admit that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an *illegal act*, may be and ought to be punished; but if he acted innocently, the judge would not be punished. [Emphasis added] (AI, 13, 14.)

It is evident that the Senator was referring to liability only if a judge was acting pursuant to a state law or custom which was illegally discriminatory. Statements of other Congressional members[12] and, in addition President Johnson,[13] who vetoed the bill, indicate that their objections were grounded upon this premise.

The case of *Monroe* v. *Pape*, 365 U. S. 167 (1961) decisively established the view that the "under color of law" provision of § 1983 applied to unconstitutional actions taken without state authority as well as to unconstitutional action authorized by the state. In that case police officers had searched a home without a warrant, and had arrested and detained the plaintiff without arraignment. They argued that they had acted outside state law, custom or usage and therefore had not acted under "color of" state authority, thereby preventing federal jurisdiction. This Court rejected that view decisively. However, *Monroe* did not discuss the doctrine of the judicial immunity exception to the Civil Rights Act and is not dispositive of that matter since that issue was not before the Court. The notion that *Monroe's* historical analysis has some bearing upon the topic of judicial immunity is dispelled by this Court's holding in *Pierson* v. *Ray*, 386 U. S. 547 (1967). Manifest in the historical analysis of *Monroe* is the absence of the debates concerning judicial officers and their immunities. Moreover, in light of *Bradley* v. *Fisher*, 13 Wall. 335 (1872),

12. Cong. Globe, 39th Cong., 1st Sess. (1866) Senator Cowan (Pa.) at p. 475; Senator Hendricks (Ind.) at 602; Mr. Raymond at 1267, Senator Johnson (Maryland) at 1778; Mr. Stewart (Ga.) at 1782.

13. Cong. Globe, 38th Cong. 1st Sess. (1866) at 1680.

and *Tenny* v. *Brandhove*, 351 U. S. 367 (1951), the extension of the doctrine in the *Monroe* decision to judges and legislators would have been evidenced in that opinion.

The question whether judicial immunity had been abolished by the Civil Rights Acts was answered by this Court in *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). There this Court held that the common law immunity of judges from civil action for acts committed within their judicial jurisdiction was so settled a principle as to be excepted from the provisions of § 1983. Furthermore, this Court considered the very same legislative history, which the Court below held to be so incisive, and found that history wanting, so much so that it "gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Mr. Chief Justice Warren expressed the feelings of eight members of the Court when he wrote:

> . . . we presume that Congress would have specifically so provided had it wished to abolish the doctrine. 386 U. S. at p. 555.

Nothing in the explicit language of *Pierson* affords a basis to limit that holding to money damages, especially in light of the Chief Justice's compelling language which draws no distinction between monetary and equitable relief:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, *but he should not have to fear that unsatisfied litigants may hound him with litigation* charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation. [Emphasis Added] 386 U. S. at 554.

The Court of Appeals draws the narrow distinction that while judges are immune from damages suits, they may

be subjected to a mandatory injunction if ever anyone should charge them in the federal courts with class discrimination. Defendant judges submit that no distinction can logically be made as to judicial immunity between damages and an injunctive order for a judge's lawful exercise of his discretion.

There is nothing in either the legislative history or in the opinion in *Pierson* that could sustain the distinction upon which the Seventh Circuit based its conclusion that "when a class-discrimination is alleged, judicial officers may be enjoined." (AI, 31, 32) The language of the civil rights debates does not afford a basis for the conclusion that judicial immunity does not exist when a class action is alleged or when permanent injunctive relief is sought. Indeed, in *Pierson* there were fifteen plaintiffs, enough to constitute a class which, at least, and contrary to the present case, was clearly identifiable and not merely speculative. Therefore, irrespective of whether a suit is characterized as an individual action or a class action, and additionally, whether it takes the form of monetary or injunctive relief, the rationale of the immunity doctrine necessitates that it remain inviolate.

This Court established in *Bradley* v. *Fisher*, 13 Wall. 335 (1871) that the doctrine of judicial immunity has "a deep root in the common law,"[14] and that the purpose of that salutary doctrine was to assure the independence of judicial judgment by obviating personal liability. This principle "obtains in all countries where there is any well ordered system of jurisprudence." Indeed, in England it has been the settled doctrine for many centuries and remains unaltered today.[15]

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14. Chancellor Kent observing that doctrine in *Yates* v. *Lansing*, 5 Johns., 291.

15. See: E. C. S. Wade and Godfrey Phillips, *Constitutional Law*, Longman Group Ltd., London, 8th edition, 1970; p. 330:

> It is a general proposition of the common law that no action will lie against a judge for any acts done or words

Since the division of law and equity is one peculiar to the common law countries, it should be emphasized in this connection, that nowhere in the historical development of equity jurisprudence did the equity courts assert the power to summon before them the judges of the law courts and to subject them to the processes of the equity courts for the exercise of their judicial functions.

Professor F. W. Maitland,[16] in lecturing his students about the historical conflict of law and equity said:

> Understand well that the Court of Chancery never asserted that it was superior to the courts of law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must

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spoken in his judicial capacity in a court of justice. "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges shall be at liberty to exercise their functions with independence and without fear of consequences." [*Scott* v. *Stanfield* (1868), L. R. 3 Ex. 220 at p. 223] It can be argued from the authorities that the judge of a court of record is not liable for anything done or said in the exercise of his judicial functions, even if he exceeds his jurisdiction.

Scope of Immunity

In the case of acts done within the jurisdiction the immunity exists, however malicious, corrupt or oppressive be the acts or words complained of. Immunity does not attach to a ministerial, as opposed to a judicial, act. Thus an action lies for a wrongful refusal to hear a case, but not for a wrong decision. Moreover a judge is not liable where he exceeds his jurisdiction owing to a mistake of fact, unless he ought to have known the facts ousting his jurisdiction. A similar immunity to that of judges attaches to the verdicts of juries, and to words spoken by parties, counsel and witnesses in the course of judicial proceedings.

See also: D. Thompson, *Judicial Immunity and the Protection of Justices,* Modern Law Review, Stevens & Sons Ltd., 1958, p. 517.

16. See Maitland, F. W., *Equity*, a Course of Lectures, Cambridge Press, 1936, p. 9.

> not do that or quashing their proceedings—*the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges,* but to the party. You in breach of trust have obtained a judgment—the Chancellor does not say that this judgment was wrongly granted, he does not annul it, he tells you that for reasons personal to yourself it will be inequitable for you to enforce that judgment and that you are not to enforce it. (Emphasis Added)

Later in his lecture on injunctions he added:

> I have already told you how this right of the Chancery was established in the reign of James I after the great quarrel between Coke and Ellesmere. It gave the Chancery the upper hand. The Chancellor could say to a person 'You must not go to a court of law,' and the court of law had no power to say 'You must not go to a court of equity.' Well, when the Judicature Acts came into force in 1875 all this came to an end. It was expressly enacted by the Act of 1873, s. 24(5), that no cause or proceeding at any time pending in the High Court should be restrained by prohibition or injunction. If in an action in the King's Bench Division—one of the old common law actions—the defendant has some equitable defence, he can plead it, and the court must listen to it and administer the rules of equity as well as the rules of law. However our Court still has power, and occasionally exercises it, to prohibit persons from suing in Colonial or foreign courts. *I say this because I wish to remind you that the Chancery never claimed any superiority over the Courts of Common Law. It could not send orders to them; but it could prohibit a person from going to them.* [Emphasis Added]

Though the unique character of American dual sovereignty separates the historical and traditional powers of equity from its American present-day counterpart, it is respectfully submitted that the basic principles of non-interference of the equity court with the exercise of judicial

functions of a judge of another court remains as vital and as necessary today as it was four hundred years ago. True, the statutory enactment of 42 U. S. C. § 1983 opened the doors of the Federal Courts and created new causes of actions in civil rights cases. Yet, § 1983 did not enlarge the traditional powers of equity. The historical conflict between the federal and state judicial systems, which is somewhat analogous to the conflict between law and equity courts has been accommodated by a healthy regard toward each judicial system's independence—namely, comity. Moreover, personal immunity of a judge from injunctive process related to the exercise of his judicial functions has remained a part of the American system of jurisprudence, as the Supremacy Clause has not been interpreted to include the assertion of power by the lower federal courts over the judicial conduct of state court proceedings.

C.

The Cases Speaking of the Abolition of Judicial Immunity Are Misconceived.

While admitting that the question of injunctive relief under § 1983 has been considered by only a very few courts (AI, 30), the Court of Appeals cited *United States* v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965), *United States* v. *McLeod*, 385 F. 2d 734 (5th Cir. 1967), *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (M. D. Fla. 1969) as ample precedent for its holding. However, in the cases cited by the majority in which equitable relief has been granted, the relief has been in the form of a prohibitory injunction, confining the state officials to the limits of their legal authority. Judge Dillon persuasively argued in his dissent below (AI, 48) that "[T]here is a great difference between ordering an official not to do a particular act, measured by objective standards, and in ordering him to exercise

his discretion in a certain way, measurable only by subjective standards".

It is essential at this point to separate those cases which discuss judicial immunity from the standpoint of ministerial functions. These cases, best exemplified by *Ex parte Virginia*, 100 U. S. 339 (1879), and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (D. C. Fla. 1969), hold that judges may be enjoined where "the right guaranteed is particularly clear" and where a judicial officer "fails to exercise a mandatory, non-discretionary, ministerial duty."[17] See also *Hadnott* v. *Amos*, 394 U. S. 358 (1969) and *In Re Herndon*, 394 U. S. 399 (1969). Defendant judges do not quarrel here with the ministerial aspect of injunctive relief, but firmly disagree with the Seventh Circuit's extension of that rule of law to areas of judicial discretion.

U. S. v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965) decided two years before *Pierson* v. *Ray*, 386 U. S. 547 (1967), held that a preventive injunction would lie against state judges where the United States sought an injunction under §206(a) of the Civil Rights Act of 1964, against interference with both the right to vote and interference with the rights of a citizen to use places of public accommodations. This seminal case, though never decided by a higher appellate court, dismissed out of hand the doctrine of judicial immunity and based its decision on *U. S.* v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), *cert. denied* 369 U.S. 850. The relief granted, however, in *Wood* was grounded upon a mandatory injunction statute, 42 U. S. C. § 1971(b), where

17. Note that the Court in *Bramlett* limited its holding to circumstances where:

> "the rights guaranteed are particularly clear, [and] *there is no infringement of the judicial discretion;* rather this order affects the peace justice only if he fails to exercise a mandatory, non-discretionary, and ministerial duty." [Emphasis added.]

the right of action was given to the *United States* to prevent intimidation of citizens registered to vote. The question of immunity was not before the court.

Furthermore, the *Clark* court, while acknowledging principles of comity (at p. 729), pronounced that "no state official is immune from having his conduct challenged . . ." citing *Cooper* v. *Aaron*, 358 U. S. 1; *Lucas* v. *Forty-Fourth General Assembly of the State of Colorado*, 377 U. S. 713; *Sterling* v. *Constantin*, 287 U. S. 378; *Bush* v. *Orleans Parish School Board* (E. D. La., 1960), 187 F. Supp. 42, aff'd 365 U. S. 569; and *In Re Wallace*, 170 F. Supp. 63 (M. D. Ala., 1959). Yet, *Clark*, under the aegis of 42 U. S. C. § 1971 of Title II of the 1964 Act (not § 1983), acknowledged that no interference with judicial discretion occurred since the action taken was merely to *prevent* trial, not to interfere with the judge's control of it.

The *Clark* opinion is a classic example of dictum-run-rampant, and the elevation of sweeping, conclusory statements, bereft of supporting rationale, to substantial case precedent. This string of Supreme Court and lower court cases cited in *Clark* as ample precedent for the imposition of federal injunctive interference, does not stand for the asserted proposition. *Cooper* referred to action of the Little Rock School Board; *Lucas* involved "various officials charged with duties in connection with state elections," 377 U. S. at 713; *Sterling* involved a governor; *Bush* a school board. In citing *Wallace*, the *Clark* court misapprehended and misconceived the scope of judicial immunity. Judge Wallace, in that case, had refused to respond to a subpoena *duces tecum* from the Commission on Civil Rights, invoking judicial privilege. District Judge Frank M. Johnson carefully drew the lines between the performance of a purely ministerial act and judicial immunity, stating (170 F. Supp. 63 at 68, 69):

> Such a subpoena, a subpoena duces tecum, requires no testimony, only production of records. Such production can be made, if he sees fit, by clerks or agents.
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> • • • • •
>
> Thus this Court now concludes that judicial status does not confer a privilege upon Judge Wallace to disregard the positive command of the law. . . . *This does not mean to say or imply that a judge is not immune from investigation or inquiry into his judicial acts; he is.* [Emphasis Added.]

The *Clark* opinion as applied by the Court of Appeals for the Seventh Circuit, stands as a monumental example of jurisprudential incantation—the singling out of an act of judicial discretion and defining it in terms of acts of a ministerial nature, then extending that analysis to all acts of judicial discretion.

United States v. *McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967), citing *Pierson* in a footnote and recognizing *Clark* in the text, concerned the arresting and prosecuting of Black citizens who had been active in voter registration. The facts of *McLeod* demonstrated that local officials had harassed and attempted to intimidate Black citizens from exercising their right to vote. Under the provisions of 42 U. S. C. § 1971(b), the United States sought an injunction to prevent prosecution of these arrested persons because prosecution violated § 1971(b), since the trial judge did not decide the case on the statutory standard as he was required to do. Yet, except for a terse conclusory comment in a footnote regarding judicial immunity, that Court's analysis of the immunity doctrine is devoid of any express analytical support.

The Seventh Circuit referred briefly to *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) as demonstrative of the issue before this Court (A1, 32). However, in *Phillips*, the plaintiffs were engaged in civil rights activities and

sought injunction against two state judges and their successors for failure to advise them of their right to counsel. Apart from the fact that this case clearly involved a ministerial duty, it was a preventive injunction which was issued to compel the justices to perform a *ministerial* duty, the absence of which violated the Sixth Amendment. Any critical reading of *Phillips* reveals that the question of judicial immunity was neither raised nor adjudicated. Indeed, the dispositive analysis of that case centered on principles of comity, tested by the standard of the pre-*Younger*[18] case of *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943).

Other cases which have often been cited in support for the demise of the immunity doctrine, demonstrate upon critical analysis their lack of legal and historical depth. Thus, *Clark* was blindly followed in *Cassidy* v. *Cecci,* 320 F. Supp. 223 (E. D. Wis. 1970), and *Stambler* v. *Dillon,* 288 F. Supp. 646, 649 (S. D. N. Y. 1968), both in a one-sentence discourse on judicial immunity. The case of *Koen* v. *Long,* 302 F. Supp. 1383 (E. D. Mo. 1969), found that judicial immunity did not apply in an injunction procedure, but based its ruling upon *Ex parte Virginia,* 100 U. S. 339 (1879), which, as previously pointed out, dealt only with *ministerial* acts. *Smith* v. *Hill,* 285 F. Supp. 556 (E. D. N. C. 1968) is a case of dubious precedent value, since the defendant judges in that case did not appear at pre-trial nor file an answer to the motion for summary judgment. *Smith* proceeded *ex parte,* and did not raise the issue of judicial immunity at all. The case of *Haley* v. *Troy,* 338 F. Supp. 794 (D. C. Mass. 1972) based its opinion upon *Koen, Stambler,* and *Hadnott* (ministerial acts).

Thus a careful reading of the decisions cited by the Seventh Circuit will reveal that they either deal with ministerial duties exercised by a judicial officer or do not

18. *Younger* v. *Harris,* 401 U. S. 37 (1971).

discuss the doctrine of judicial immunity or are ex parte proceedings in which the accused judges did not participate or are based upon a misapprenhension of other decisions utilized as precedents. Verily, the observation of Mr. Justice Frankfurter in *United States* v. *Rabinowitz*, 339 U. S. 56, 71, 75 (1950) is in point here:

> Of course in this field of law, as in others, opinions sometimes use language not with fastidious precision . . .
>
> * * * * *
>
> These decisions do not justify today's decision. They merely prove how a hint becomes suggestion, is loosely turned into dictum, and finally elevated to a decision.

These words apply with full force to the decision of the Court of Appeals.

D.

The Weight of Case Law Supports Judicial Immunity.

The essence of the rule of judicial immunity is the necessity for complete, unfettered, judicial independence and the desirability to avoid "imposing such a burden on judges [which] would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). This Court decided in *Pierson* that "the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Id. at 554. This conclusion was also reached by the Third Circuit in *Bauers* v. *Heisel*, 361 F. 2d 581 (1966). The underlying rationale of both these cases is the desire to protect judicial independence by barring *all* civil suits which have that effect.

Although an exhaustive study of injunctive relief under § 1983 was made by the Court below, the case of *MacKay* v. *Nesbett*, 285 F. Supp. 498, 502, 503 (D. C., Alaska, 1968), affd. 412 F. 2d 846 (1969), cert. denied 396 U. S. 960, was

overlooked. In that case an equitable proceeding was instituted, against a majority of the justices of the Alaska Supreme Court to have a final order suspending plaintiff from the practice of law for one year declared null and void and to enjoin its effect. Jurisdiction was invoked under the Civil Rights Act (28 U. S. C. § 1343), 42 U. S. C. § 1983, and under 28 U. S. C. § 1331. Upon consideration of a motion to dismiss, the district court evaluated the jurisdictional question on two grounds: (1) the anti-injunction statute, 28 U. S. C. § 2283, and (2) judicial immunity; it found either ground sufficient to grant dismissal. While the Court's position in *MacKay* as to 42 U. S. C. § 2283 is no longer tenable in the light of *Mitchum* v. *Foster*, 407 U. S. 225, 32 L. Ed. 2d 705 (1972), the Court's analysis of judicial immunity and § 1983 remains compelling.

Reaffirming the tenet of judicial immunity for judicial acts, the Court held that "[t]he Civil Rights Act creates no exception to this immunity," citing *Pierson* v. *Ray*, 386 U. S. 547, *Sires* v. *Cole*, 320 F. 2d 877 (9th Cir. 1963), *Johnson* v. *MacCoy*, 278 F. 2d 37 (9th Cir. 1960), and *Hagan* v. *State of California*, 265 F. Supp. 174 (C. D. Cal. 1967). It declared (285 F. Supp. 498 at 503):

> The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages. [Citations] The reasons for the rule of judicial immunity apply regardless of the nature of the relief sought.

In *Gay* v. *Heller*, 252 F. 2d 313, 315 (5th Cir. 1958), the Fifth Circuit applied the rule of judicial immunity in an action seeking both injunctive relief and damages. There the plaintiff alleged that judicial irregularities had deprived her of her civil rights under the Civil Rights Act. In disposing of the plaintiff's claim, the Court applied the rule of judicial immunity, adding that: "[t]he normal

way to correct errors in the trial or other disposition is by appeal, not by suing the judge." Additionally, in *Cade* v. *Carpenter*, 367 F. 2d 572 (5th Cir. 1966), that same Court held that a petition for habeas corpus directed a state judge (and not against the person holding him in custody) "fails to state a ground on which relief can be granted since the actions of the District Judge are protected by the bar of judicial immunity."[19] See also *Collins* v. *Moore*, 441 F. 2d 550 (5th Cir. 1971).

The Eighth Circuit has held that no action under 42 U. S. C. § 1983 lies against a judge for a declaratory judgment, injunctive relief, and money damages. *Tate* v. *Arnold*, 223 F. 2d 782 (8th Cir. 1955). In that case plaintiff class alleged that the judge was acting under color of law in issuing unlawful writs of garnishment before judgment. Alleging irreparable injury and a multiplicity of "unjust" suits, the members of the class stated that they were:

> ". . . entitled to an Injunction against Frank Arnold, Justice of the Peace, . . . perpetually restraining him from issuing, serving or executing against any employer of these plaintiffs, . . . without first requiring any and all creditors of anyone or all of the plaintiffs to file the requisite bond, ..."

Noting that the plaintiffs sought the recovery of only $500.00 from the defendant judge, the Eighth Circuit regarded the case in light of both injunctive and monetary immunity. The Court rejected plaintiff's theory that Congress intended to abrogate judicial immunity through the enactment of the Civil Rights Act, and held that the rule was so well founded in history, public policy and practical necessity that "we refrain from a further restatement of those expressions here."[20]

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19. See also: *Gaito* v. *Ellenbogen*, 425 F. 2d 845 (3rd Cir. 1970).

20. See also: *Rhodes* v. *Houston*, 309 F. 2d 959 (8th Cir. 1962), aff'g 202 F. Supp. 624 (D. Neb. 1962).

IV.

The Decision Below Violates the Historic Comity Relationship Between Federal and State Judicial Systems.

Defendant judges submit that the decision below dilutes the effectiveness of the doctrine of comity. The Court of Appeals has held that though the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971) do not control this civil action, if they did "the plaintiffs' allegations are sufficient to come within the 'exceptional circumstances test' . . ." (AI 34). Yet, the Amended Complaint makes only general and conclusory statements of bad faith; no concrete instance is mentioned. In addition, plaintiffs' claim of irreparable harm is illusory since not one member of the class has actually alleged or shown any injury. Moreover the vast array of state remedies available to plaintiffs under the State Constitution and statutes for any judicial misconduct negates most forcefully the existence of "exceptional circumstances" in the present case.

While reciting the recent case of *Mitchum* v. *Foster*, (at 718), the Seventh Circuit ignored this Court's statement:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger* v. *Harris*, 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Steffanelli* v. *Minard*, 342 U. S. 117; *Cameron* v. *Johnson*, 390 U. S. 611."

In considering the removal power in civil rights cases, this Court held in *Greenwood* v. *Peacock*, 384 U. S. 808 at 827, 828 (1966), that the federal courts should generally not interfere with the state judicial process:

> It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. *The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.* Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicated by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel* [384 U. S. 780]; *Strauder* v. *West Virginia*, 100 U. S. 303. (Emphasis Added.)

In the recent case of *Lynch* v. *Snepp*, 472 F. 2d 769, 771 (4th Cir. 1973), the Fourth Circuit re-examined the scope of the comity doctrine and the question "to what extent the general notions of comity, equity and federalism, as exposited in *Younger* and its companion cases, apply in [the] civil context." There plaintiffs filed a suit against a state court judge and challenged, under 42 U. S. C. § 1983, the constitutionality of two orders issued by that judge. The plaintiffs sought a preliminary injunction against enforcement of the orders.

Recognizing the difficulty in maintaining a stable equilibrium between the dual sovereignties, the Court in *Lynch* said at p. 773:

> The interest in protection of constitutional rights pulls in one direction and the interest in preserving the rightful independence of state judiciaries pulls in the opposite direction.[21]

Because of the required sensitivity to the legitimate interests of both systems, this Court has had "to repeat time and time again that the normal thing to do . . . is not to issue such injunctions." *Younger* v. *Harris*, 401 U. S. 37 at 45.

The long-standing policy against federal court interference with state court proceedings is grounded in our jurisprudential history[22] and founded upon the rule that equity should not act when there exists an adequate remedy at law.[23] Since a state court and a federal court may each take jurisdiction of many issues, the tribunal which first exercises jurisdiction holds it to the exclusion of the other. *Taylor* v. *Taintor*, 16 Wall. 366 (1873). Therefore, it has been held that the jurisdiction first obtained by a state court should generally not be interfered with by the federal courts. *Ex parte Chetwood*, 165 U. S. 443 (1897); see also *University Day Care Center, Inc.* v. *Temple University*, 442 F. 2d 1116, 1118 (3rd Cir. 1971); and *Ganyer* v. *Peyton*, 379 F. 2d 710 (4th Cir. 1967).

The Court in *Lynch* after surveying the scope of comity held that interference with state proceedings does not de-

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21. See: Comment, Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent, 38 U. Chi. L. Rev. 612-13 (1971).

22. See: Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States, 226, 299 (Freund ed., 1971).

23. See Argument III B, pp. 27-29. See also: *Younger* v. *Harris*, *supra* at 43-44.

pend on whether the state action is characterized as "civil or criminal." (Citing cases at p. 773.) The plaintiffs in *Lynch* did not show that the judicial machinery had been utilized in bad faith or for harassment.

This Court in *Mitchum* v. *Foster*, has recently passed upon the question whether 42 U. S. C. § 1983 constitutes an "expressly authorized" exception to the federal anti-injunction statute, 28 U. S. C. § 2283, which prohibits the federal courts from granting injunctions staying state court proceedings. Holding that § 1983 is an exception to 28 U. S. C. § 2283, this Court analyzed the historic foundation upon which the anti-injunction statute rests. Reconciling the civil rights provisions with the anti-injunction statute, this Court was prompted to reconsider the relationship between the federal and state governments. The Court said (32 L. Ed. 2d at 717):

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U. S. 339, 346, 25 L. Ed. 676, 679. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441; cf. Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7; Dombrowski v. Pfister, 380 U. S. 479, 14 L. Ed. 2d 22, 85 S. Ct. 1116.

It must be noted that this Court did not consider the doctrine of judicial immunity as it had in *Pierson* v. *Ray*. There, this Court found that the doctrine of judicial immunity was an exception to § 1983. The significance placed upon this Court's holding in *Mitchum* v. *Foster* by the Court of Appeals for the Seventh Circuit is misplaced in that (1) *Mitchum* did not reach the question of judicial immunity and (2) this Court expressly held that judicial immunity was an exception to § 1983. The language in *Mitchum* that refers to the protection of federal rights against unlawful state action "whether that action be executive, legislative or judicial," is based upon the case of *Ex parte Virginia*, 100 U. S. 339 (1879), and must be understood and interpreted within the confines of that case.

In *Virginia*, this Court narrowly defined the limits to which its holding was to apply, saying (100 U. S. at 348):

> It was insisted during the argument on behalf of the petitioner that Congress cannot punish a state judge for his official act; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . *it is merely a ministerial act*. . . . [Emphasis Added.]

The activities of Judge Cole in *Virginia* which were under scrutiny by this Court were "ministerial" and fully comport with the well settled rule that equitable relief was not barred where a purely ministerial function is involved.

Thus, the dictum in *Mitchum* v. *Foster* can in no way be interpreted as having overruled *Pierson* v. *Ray*, 386 U. S. 547 (1967) or having discarded the time-honored doctrine of judicial immunity.

Considering all these factors, even if it is assumed for argument's sake that the doctrine of judicial immunity has been abolished—indeed a horrendous thought—it is respectfully submitted that hardly any more appropriate set of circumstances can be visualized, calling for the exercise of abstention on the part of the federal courts, than the one presented in the case at bar.

The possibility that the district court could "require . . . periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints"[24] from the state courts, effectively circumvents the utilization of the various state corrective remedies and procedures dealing with the supposed judicial misconduct of judges and thereby deprives the people of the State of their right to deal with these matters, which primarily affect them, in their proper state tribunals; moreover, such possibility of injunctive action would vastly exceed the limits of *Younger* and effectively place the state courts in receivership. The result would be a clear violation of the healthy and traditional respect that the two judicial systems have held under the rules laid down in *Younger* v. *Harris*, *supra*.

V.

The Abolition of Judicial Immunity in Actions Seeking Permanent Injunctions Would Violate the Constitutional Guaranty to the States of a Republican Form of Government.

The Constitution of the United States provides in Article IV, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when

24. See: AI, 46 and Statement of the Case p. 7.

the Legislature cannot be convened) against domestic Violence." In the past, cases construing Article IV, § 4 have most commonly referred to the right of the people to choose their own officers for governmental administration, and pass upon their own laws. *Duncan* v. *McCall*, 139 U. S. 449 (1891). However, the scheme of government in the United States encompasses within its scope the legislative, executive and judicial branches and their rights to pass, administer, enforce, and interpet the laws of either the nation or the state. Mr. Justice Harlan in his dissent in *Taylor* v. *Beckham*, 178 U. S. 548, 609 (1899), said:

> The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial.

Recognizing this tripartite form of government, the founding fathers guaranteed to the states that this form of government would be secure in whatever form they choose to implement it. It has been held that a "republican form of government" includes the right to have a system of state courts. *United States* v. *Downey*, 195 F. Supp. 581 (D. C. Ill. 1961); and *Bauers* v. *Heisel*, 361 F. 2d 581 (3rd Cir. 1966). While these cases indicate that a judicial system is a necessary element to a republican form of state government, the courts have stated that the particular method of selection of state judges and the specific structure of the state judicial system is left to the states. *Holshouser* v. *Scott*, 335 F. Supp. 928 (D. C. N. C., 1971). In *Bauers* v. *Heisel*, 361 F. 2d 581, the Third Circuit declared that judicial immunity was essential to preserve to the states a republican form of government; the Court recognized that in order to preserve the freedoms offered by a democracy, an independent and effective judiciary is necessary (361 F. 2d 581 at 588-9):

> The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensible element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various States, and consequently deprive them of a republican form of government.

It is essential that the state judiciary remain free to pass upon its own laws without fear of federal district court surveillance. Where a pattern emerges, or is allowed to emerge, that state judicial officers can be summoned before a federal district court on the mere allegation of a pretended non-existent class (of which plaintiffs are not members) that they engage in some "pattern and practice" of conduct somehow inimical to the class, then the obvious result will be the destruction of the state judiciary and thereby of the republican form of government.[25]

Thus it becomes evident that the transfer of the power to review state court judicial behavior from the state appellate system to the federal district court, denies to the state the ability to effectively exercise independent judgment regarding the conduct of its judicial officers and their decisions. The discipline of Illinois state court judges is placed in the hands of the federal district courts, rather than the people of the state by whom they are elected; this, in turn, presages the egregious circumstance of unsatisfied litigants using the federal district courts as courts of appeal—a fact destructive of our governmental system.

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25. See Note, 66 Harv. L. Rev. 1285, 1296, n. 54 (1953).

CONCLUSION.

For the above reasons, defendant judges respectfully pray that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed as to them, and that this Court hold that the doctrine of judicial immunity protects all judges in the performance of judicial acts.

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No 72-953

MICHAEL O'SHEA and DOROTHY SPOMER, *Petitioners,*

vs.

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No. 72-955

W. C. SPOMER, *Petitioner,*

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF EVELLE J. YOUNGER ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AMICUS CURIAE

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BRIEF OF EVELLE J. YOUNGER ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The opinion of the court below, extending the jurisdiction of the federal district courts over the day to day operations of a county prosecutor's office and limiting his traditional immunity from suits brought

under the Civil Rights Act, has implications that reach far beyond the borders of Alexander County, Illinois. As it presently stands, the decision of the Seventh Circuit portends the extension of federal supervision over every county prosecutor in every State of the Union.

Under article V, section 13 of the California Constitution, the Attorney General is charged with direct supervision over every district attorney and sheriff and the duty to see that state law is uniformly and adequately enforced in each of California's 58 counties. This state constitutional mandate necessarily requires him to resist the creation of precedent which would displace his supervisory powers with those of the federal courts. Also, once the federal courts have assumed supervisory powers over a county prosecutor's office, it would not be a long step for them to assume supervisory powers over a state attorney general's office as well. The interest of the California Attorney General in adequate and effective local law enforcement and in preserving his own supervisory powers thus brings him before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

Like judicial immunity, prosecutorial immunity is essential for the proper administration of justice. An injunction suit can be as disruptive as an action for damages, and its potential for abuse, coupled with the ease with which a claim can be pleaded and discovery

obtained, require that the prosecutor's traditional immunity from both types of suits be retained. Even the threat of such suits could improperly curtail a prosecutor's exercise of discretion.

In any event, if the federal courts undertake to exercise supervision over local prosecutors, the well established doctrines of federalism and comity require that they abstain from doing so until state supervising authorities have had a fair opportunity to act.

ARGUMENT

I

THE TRADITIONAL RULE THAT PROSECUTORS AS QUASI-JUDICIAL OFFICERS ARE IMMUNE FROM SUIT UNDER THE FEDERAL CIVIL RIGHTS ACT, INCLUDES IMMUNITY FROM INJUNCTIVE RELIEF AS WELL AS ACTIONS FOR DAMAGES

In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court, describing the doctrine of judicial immunity as "solidly established at common law" (*id.* at 553-554) held that a judge may not be held liable in a damage action brought under the Civil Rights Act (42 U.S.C. §1983) for acts committed within his judicial jurisdiction. This immunity attaches without regard for the personal motives with which the judge may have acted. The Court had previously recognized legislative immunity in *Tenney v. Brandhove,* 341 U.S. 367 (1951).

The basic policy behind immunity was explained by the Court as follows:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> "We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. at 554-555.

Almost reluctantly, and under the compulsion of this Court's decision in *Pierson v. Ray, supra,* the Seventh Circuit held that a county prosecutor is immune from an action for damages brought under the Civil Rights Act (42 U.S.C. § 1983), but went on to hold that a district court may issue an injunction to control the day to day functioning of a prosecutor's office.

That a prosecutor's decision-making function is sufficiently similar to that of a judge to make applicable the doctrine of judicial immunity was recognized by the Seventh Circuit, "[T]he immunity, often characterized as 'quasi-judicial,' cloaking the prosecuting attorneys is, of necessity, derivative from

concepts developed in connection with the judiciary. . . ." 468 F.2d at 408-409.

The reasons why the prosecutor, nominally an executive officer, shares in an immunity conferred on the judicial branch, were concisely summarized in *Bauers v. Heisel,* 361 F.2d 581 (3d Cir. 1966) as follows:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions. [Citation omitted]. Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, [citation omitted]: his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. [Footnote omitted]. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself." *Id.* at 589-590.

Since, as this Court has thrice noted, immunity is afforded a public official not for his own good but for

the good of the public (*Pierson v. Ray, supra,* 386 U.S. at 554; *Tenney v. Brandhove, supra,* 341 U.S. at 377; *Bradley v. Fisher,* 13 Wall. 335, 349 [1871]), it is the public interest which must ultimately determine whether a prosecutor's decision making function is subject to the injunctive power of the federal courts.[1]

This case comes before the Court in a factual setting involving confrontations between white citizens and black citizens in a small rural community, from the plaintiff's point of view, about as appealing a set of facts as could be conceived. However, once the federal courts begin to exercise supervisory jurisdiction over state prosecutors, it will prove impossible to confine that jurisdiction to cases involving alleged racial discrimination. As pointed out by the National District Attorney's Association in their petition for certiorari (pp. 18-19), the assumption that such suits if allowed would be seldom filed simply flies in the face of reality. There are any number of special interest groups[2] who would jump at the chance to

[1]To be distinguished are cases brought under section 1983 to enjoin a state court prosecution in which the district attorney is named as defendant, *e.g., Mitchum v. Foster,* 407 U.S. 225 (1972); *Younger v. Harris,* 401 U.S. 37 (1971). These cases, directed against the enforcement of specific statutes alleged to be unconstitutional on their face or as applied, in no way involve the prosecutor's exercise of discretion. In such cases the prosecutor is simply a nominal defendant, present in the case because a state or municipality is not a "person" within the meaning of section 1983. *Monroe v. Pape,* 365 U.S. 167 (1961); see also *Moor v. County of Alameda,* 41 U.S.L.W. 4627 (May 14, 1973). Here there is no attack on the constitutionality of the state statutes under which the prosecuting attorney is proceeding.

[2]The use of the term "special interest group" is not here intended as pejorative, but merely descriptive.

litigate in a federal court the question of whether a district attorney is prosecuting a class of cases with which they are concerned with either excessive or insufficient vigor. We know from experience in the Office of the California Attorney General, that the most bitter, personally vindictive and hard fought political battles occur not at the national or state level but at the county level, and more often than not feature allegations of district attorney incompetence, malice and even corruption. Clearly these conflicts should not be transferred to the federal courts.[3]

Our concern in supporting the argument for total immunity is not so much for the time of the federal court required to hear the case as it is for the disruptive impact of such litigation on a local prosecutor's office if the doctrine of quasi-judicial immunity is in any way abridged. Given the presence of a state officer subject to suit, it is relatively easy under modern federal pleading rules to state a cause of action under the Civil Rights Act. Indeed, this very Court in *Haines v. Kerner,* 404 U.S. 519 (1972), held that a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure should only be granted in a Civil Rights case when it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

The Seventh Circuit almost naively assumes that at worst the recognition of a cause of action would

[3]*Cf.* "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove, supra,* 341 U.S. at 378.

require no more than that the district attorney periodically file with the court a report of his performance. 468 F.2d at 414-415. What it entirely overlooks is the impact on a local prosecutor of the broad discovery tools available to any plaintiff once the complaint has survived a motion to dismiss under Rule 12(b). "[T]he filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure . . . such a proceeding, with its discovery rules and other procedural formalities, can take a significant amount of time. . . ." *Preiser v. Rodriguez,* 41 U.S.L.W. 4555, 4561 (May 7, 1973). The district attorney, his assistants and investigators can be required to give depositions and answer lengthy and complex interrogatories, thus bringing their important prosecutorial functions to a standstill. Even more ominously, the files of a district attorney, previously assumed to be confidential, can be opened to potential criminal defendants. Indeed, it is not inconceivable that an astute criminal defendant could use the vehicle of an easily pleaded civil rights action to obtain access to materials not otherwise discoverable under state law.

In the conclusion of its opinion, Seventh Circuit claims that it has done no more than recognize a federal cause of action, assuming that this would impose no real burden on the defendants. What the Seventh Circuit appears to have overlooked is that curtailment of the prosecutor's immunity gives any disgruntled individual or group the opportunity vir-

tually to hamstring local law enforcement during the discovery phases of a civil rights case without regard to the factual merits of their claim. Thus the very pendency of a federal injunction action against a local prosecutor can have a drastic impact on his office in terms of time, diversion of resources and disclosure of confidential material even if the complaint ultimately proves groundless.

Moreover, even if the hopes of the Seventh Circuit come true, and such suits are seldom filed, the fact that such suits *could* be filed would have a "chilling effect" on the prosecutor's exercise of discretion. The decision whether or not to prosecute a given criminal offense is a delicate and sometimes difficult one in which considerations of the defendant's guilt and the prospects of obtaining a conviction or plea of guilty are only preliminary. See *Kaplan,* The Prosecutorial Discretion—A Comment, 60 Nw. L. Rev. 174 (1965). Injecting into the decision making equation, the threat of a federal lawsuit and its attendant disruption of his office, could well tip the balance in favor of prosecution in some cases where the prosecutor was uncertain of the defendant's guilt or less than confident of obtaining a conviction. (Significantly, in the present case, it is *not* alleged that the prosecutor refused to act even though he knew a conviction could be obtained.) To commence a prosecution without a reasonable hope of conviction has been described by this Court as "bad faith" conduct. *Younger v. Harris, supra,* 401 U.S. 37, 47-49 (1971); *Dombrowski v. Pfister,* 380 U.S. 479, 490 (1965).

It is no answer to say, as does the Seventh Circuit, that the federal courts, in entertaining such cases, are simply vindicating the public interest in "even-handed and nondiscriminatory enforcement of the laws." 468 F.2d at 413. The problem is that a private party or special interest group may have an individualized view of the public interest, or of nondiscriminatory law enforcement, poles part from the real thing. Indeed if the public interest could truly be objectivised, there would be no need for prosecutorial discretion at all. But the very recognition of the necessity that discretion be vested in prosecutors (*Bauers v. Heisel, supra,* 361 F.2d 581, 590) necessarily refutes that assumption. Having been given discretion, a prosecutor ought not be required to exercise it under fear of a federal lawsuit.[4] We respect-

[4]The American Bar Association Project on Standards for Criminal Justice in its standards relating to the Prosecution Function, approved draft 1971, contains the following: "(2.1) Prosecution authority should be vested in a public official. The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline. (3.4) Decision to charge. (a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor. (b) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted. (c) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present his complaint for prior approval to the prosecutor and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury." (pp. 49, 83.)

The Commentary to these standards states in part: "The concept that the state has a special interest in the prosecution of criminal cases which requires the presence of a professionally trained advocate arose during the formative period of American law. Earlier, in England, it had been assumed that prosecution was a matter for the victim, his family or friends. See Schwartz, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION

fully submit that the compelling public interest in the effective law enforcement at the county level requires no less than that the absolute immunity doctrine be retained in its entirety.

II

ASSUMING THAT A CAUSE OF ACTION MAY BE STATED FOR INJUNCTIVE RELIEF, THE FEDERAL COURTS OUGHT TO ABSTAIN FROM SUPERVISING THE OPERATIONS OF THE COUNTY PROSECUTOR'S OFFICE UNTIL STATE REMEDIES HAVE BEEN EXHAUSTED OR PROVEN INEFFECTIVE

California constitutional and statutory law places local district attorneys under the supervision of the state attorney general. Thus, article V, section 13 of the Califorina Constitution provides as follows:

> "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be his duty to see that the laws of the State are uniformly and adequately enforced. He shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such reports concerning the investigation,

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OF CRIMINAL JUSTICE 4-5 (1962). The idea that the criminal law, unlike other branches of the law such as contract and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of charge gives greater assurance that the rights of the accused will be respected than is the case when the victim controls the process.

"Whatever may have been feasible under conditions of the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official." (pp. 49, 84.)

> detection, prosecution, and punishment of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, he shall assist any district attorney in the discharge of his duties."

Pursuant to this provision, the California Legislature enacted section 12550 of the Government Code which provides:

> "The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge.
>
> "When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process."

Thus, even though California law does not authorize a private party or a court on its own motion to institute criminal proceedings (*People v. Municipal Court*, 27 Cal.App.3d 193, 103 Cal.Rptr. 645 [1972]),

any person or group of persons who feel that a district attorney is not properly enforcing the law may bring the matter to the attention of the Attorney General, who has the power and indeed the duty to intervene in the local situation if the facts require such action.

Accordingly, should this Court hold that federal courts may under the provision of the Civil Rights Act exercise supervisory powers over a district attorney's office, it should also formulate an abstention doctrine analogous to that enunciated recently in *Younger v. Harris,* 401 U.S. 37 (1971). In that case, this Court held that the fundamental doctrines of comity and federalism require that a federal court not issue an injunction to restrain a state criminal prosecution brought in good faith. The doctrines of comity and federalism were explained by this Court as follows:

> "The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent

erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important

place in our Nation's history and its future." 401 U.S. 43-45.

Federal interference with a state prosecutor's decision whether or not to prosecute any number of state law violations committed by any number of potential defendants is at the very least as disruptive as the issuance of an injunction to restrain a single criminal prosecution. Consequently, where under its own law a state has provided a remedy for prosecutor misfeasance or malfeasance in office, considerations of federalism and comity require that the federal court abstain from exercising its jurisdiction until those remedies have at least been tried. Thus, it is oversimplistic to say, as did the Seventh Circuit, that there is no requirement for exhaustion of state legal or political remedies in a suit brought under the Civil Rights Act. 468 F.2d at 413. That statement ignores the well-settled doctrine of abstention. *Younger v. Harris, supra;* see also *Mitchum v. Foster,* 407 U.S. 230 (1972).

This Court recently held that injunctive relief under the Civil Rights Act is not available to state prisoners who can assert their claims on federal habeas corpus.

> "The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined in *Younger v. Harris,* 401 U.S. 37, 44 (1971), as a 'proper respect for state functions,' *and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.*

". . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser v. Rodriguez, supra,* U.S.L.W. at 4560. (Emphasis added).

We therefore respectfully submit that even if this Court does hold that a cause of action was stated under the Civil Rights Act, the doctrine of abstention ought to apply in states like California which provide a remedy for prosecutorial malfeasance.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Dated, San Francisco, California,
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IN THE

Supreme Court of the United States

No. 72-953.

MICHAEL O'SHEA AND DOROTHY SPOMER,
Petitioners,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

No. 72-955.

W. C. SPOMER,
Petitioner,

vs.

EZELL LITTLETON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

Respondents, individually and on behalf of the class of persons specified in the amended complaint, file this brief in response to the briefs filed on behalf of the petitioners.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Littleton* v. *Berbling*, 468 F. 2d 389 (7th Cir. 1972). The opinion of the District Court for the Eastern District of Illinois is not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). The Petitions for a Writ of Certiorari filed by the two judges and the current state's attorney were granted on April 2, 1973. The Petitions for a Writ of Certiorari filed by the predecessor state's attorney and his investigator, No. 72-1107, have neither been denied nor granted by this Court at this time.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The following constitutional and statutory provisions are printed at the end of this brief in the Appendix:

U. S. Const., amend. I, VIII, XIII and XIV
Ill. Const., Art. 1, § 13
28 U. S. C. § 1343
42 U. S. C. §§ 1981, 1982, 1983, 1985
Ill. Rev. Stat., ch. 14 § 1 (1971)
Ill. Rev. Stat., ch. 37 § 72.2 (1971)
Ill. Rev. Stat., ch. 38 § 112-4(a) (1971).

QUESTIONS PRESENTED.

1. Whether the amended complaint adequately states claims for equitable relief under the Civil Rights Act?

2. Whether a federal court has the authority under the Civil Rights Act to enjoin state judges and a state's attorney

from engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice?

3. Whether the doctrines of judicial and quasi-judicial immunity bar an action under the Civil Rights Act seeking equitable relief?

STATEMENT OF THE CASE.

Respondents brought this class action under 42 U. S. C. §§ 1981, 1982, 1983 and 1985 (hereinafter referred to as the "Civil Rights Act") and 28 U. S. C. § 1343(3) and (4) individually and on behalf of black persons, and white persons sympathetic to the plight of blacks, from the City of Cairo, Illinois similarly situated, against the petitioners who, as public officials administering criminal justice in Alexander County, systematically discriminate against them and members of their class on the basis of race or creed, interfering thereby with the free exercise of their constitutional rights.[1] The constitutional rights invaded are those guaranteed by the First, Eighth, Thirteenth and Fourteenth Amendments.

Petitioners Dorothy Spomer and Michael O'Shea and W. C. Spomer's predecessor in office filed motions to dismiss the amended complaint.[2] The district court on March 23, 1971 dismissed respondents' claims for injunctive relief for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The Court of Appeals for the Seventh Circuit, on October 6, 1972, reversed the district court's decision and

1. The original complaint was filed on July 23, 1970; the amended complaint was filed on October 23, 1970.

2. The original action was also brought against Peyton Berbling, then State's Attorney for Alexander County, Illinois, and Earl Shepherd, his investigator, for injunctive and other equitable relief and to recover damages. The motion of Berbling and Shepherd to dismiss the amended complaint as to them was sustained by the district court and reversed by the Seventh Circuit. A Petition for a Writ of Certiorari filed by Berbling and Shepherd is pending, unruled upon, before this Court, No. 72-1107.

remanded the case for further proceedings before a different district judge.

The petitioners are: Dorothy Spomer and Michael O'Shea, associate judges of the Circuit Court for Alexander County, and W. C. Spomer, the current state's attorney for Alexander County. W. C. Spomer was not a defendant or appellee below. Upon the expiration of the term of office of his predecessor, Peyton Berbling, who was a defendant and appellee below, W. C. Spomer substituted himself as a party pursuant to Rule 48 of the Rules of the Supreme Court of the United States.

Respondents seek equitable relief against each of the petitioners.

The named respondents, with two exceptions, are black citizens of Cairo. Two respondents are white persons who sympathize with the plight of blacks in Cairo. Respondents are financially poor persons. They filed this action on behalf of themselves and all other persons similarly situated. The class includes all those, including the named respondents, who, on account of their race or creed and because of their exercise of First Amendment rights, have been and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County. (Paragraph 3 of the amended complaint.) The class also includes all those, including the named respondents, who, on account of their poverty, are unable to afford bail or are unable to afford counsel and jury trials in city ordinance violation cases. (Paragraph 4 of the amended complaint.)

The amended complaint alleges that since the early 1960's black persons of the City of Cairo, Illinois have been actively seeking equal opportunity and treatment in employment, housing, education and ordinary day-to-day relations with white persons and officials of Cairo. In furtherance of this equality quest, respondents and members of their class encourage others to engage in an economic boycott of local merchants who prac-

tice racial discrimination. This equality quest generated and continues to generate substantial antagonism from not only the public officials in Cairo but also from local white residents.

Spomer and O'Shea, as judges, intentionally engage in a pattern and practice of racial discrimination[3] against respondents and members of their class as follows: They set bond in criminal cases by following an unofficial bond schedule applicable to black persons without regard to the facts of the case or circumstances of an individual defendant. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct. They require black persons, when charged with violations of city ordinances, to pay for a trial by jury, yet do not require other persons to pay for a trial by jury.[4] Each practice is carried out with intent to deprive respondents and the class of the benefits of the criminal justice system and to deter them from engaging in a peaceful boycott and other activities protected by the First Amendment. (Paragraph 34 of the amended complaint, which incorporates by reference paragraphs 1-5 and 10-11, and paragraphs 35-40 of the amended complaint.)

The state's attorney intentionally engages in a pattern and practice of racial discrimination in the exercise of his office against respondents and members of their class by refusing to afford black persons an opportunity to give evidence of criminal conduct committed by white persons against black persons. He refuses to initiate criminal proceedings against white persons arising out of assaults and batteries committed by them against black persons. He refuses to proceed on black persons' com-

3. It is also alleged that their discrimination is based upon economic status. The effect insofar as the right to injunctive relief is concerned is the same as when the discrimination is based upon race. *See Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

4. In Illinois, a defendant has a right to a trial by jury in such cases, even if the penalty is a fine and not a jail sentence. Ill. Const. Art. 1, § 13.

plaints by information. In some instances he declines to interrogate black complainants before a grand jury. In some instances he interrogates black persons before the grand jury in such a manner as to deprive them of their right to give evidence to the grand jury.

Among the examples described in the amended complaint of the above repeated discriminatory conduct by the state's attorney in the exercise of his office are the following:

(1) On March 28, 1969, respondent James Wilson, a black man, complained to the state's attorney that one Charlie Sullivan, a white man, assaulted Wilson with a gun in a threatening manner when Wilson attempted to move his family and household furnishings into a house adjacent to Sullivan on 22nd Street in the City of Cairo. On or about March 29, 1969, Sullivan repeatedly fired gun shots in the vicinity of Wilson's home with the intent to intimidate Wilson's family. The state's attorney, however, refused to permit Wilson to file criminal charges against Sullivan respecting either instance of Sullivan's criminal conduct.

(2) In January, 1970, the state's attorney refused to permit respondent Robert Martin, a black man, to file criminal charges against Charlie Sullivan as a result of Sullivan's attempt to run him down with a truck at a time when Martin was peacefully marching in exercise of his First Amendment rights.

(3) In June, 1970, the state's attorney refused to permit respondent Ezell Littleton, a black man, to file criminal charges against a white man who without cause or justification assaulted and battered Littleton.

(4) In June, 1970, the state's attorney refused to permit respondent, Manker Harris, a white man sympathetic to the effort of Cairo blacks, to file criminal charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

(5) On August 10, 1970, the state's attorney, through his investigator Earl Shepherd, refused to permit respondent Hazel James, a black woman, to file criminal charges against one Raymond Hurst, a white man, who kicked her in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and local public officials.

(6) On August 8, 1970, respondent Morris Garrett, a thirteen year old boy was struck by one Tom Madra, a white man, during a demonstration against the racially discriminatory practices of merchants and local public officials. A complaint was filed which the state's attorney presented to the grand jury. The state's attorney, in interrogating Morris Garrett before the grand jury, did not question him concerning the incident of August 8, 1970, but rather asked such questions as "did you get paid for picketing?"

(7) On August 13, 1970, Jack Guetterman, Jr., a white man, fired gun shots in the vicinity of respondents Cheryl Garrett and Yvonda Taylor. Respondents Walter Garrett ("W. Garrett") and Ezell Littleton, following a telephone call from the victims, went to the scene of the shooting. Shortly thereafter, W. Garrett discussed the incident with police officers. During the discussion, Jack Guetterman, Sr., a white man, struck W. Garrett in the face, causing him to fall to the ground. W. Garrett filed a complaint which the state's attorney presented to the grand jury. W. Garrett testified before the grand jury, but was not interrogated by the state's attorney respecting the incident. Littleton, who witnessed the assault, was not called to testify.

(8) On or about August 8, 1970, Al Moss, a white man, struck respondent Curtis Johnson while Johnson demonstrated against the racially discriminatory practices of merchants and local public officials. Johnson filed a complaint which the state's attorney presented to the grand jury. The state's attorney, however, did not interrogate Johnson respecting the incident.

The state's attorney engages in the practice of recommending greater bonds and sentences in cases involving black persons than he does when the case involves white persons. He engages in a practice of bringing significantly more serious charges against black persons for conduct which would result in no charge or a minor charge against white persons.

All of the alleged practices engaged in by the state's attorney are willful and malicious. He intends to deprive respondents of their right to give evidence against those who threaten their security, peace and tranquility and to deprive respondents of their right to hold property to the same extent as is enjoyed by white persons and to deter respondents from engaging in a peaceful boycott and other activities protected by the First Amendment.

SUMMARY OF ARGUMENT.

On a motion to dismiss, the Court must construe the amended complaint liberally, considering all factual allegations to be true. Mere vagueness or lack of detail is not a ground for a motion to dismiss. Complaints need not be verified, but may be signed by an attorney, which signature constitutes his certificate that to the best of his knowledge, information and belief there is good ground to support it.

The Seventh Circuit properly held that the amended complaint states claims upon which relief may be granted. The Civil Rights Act provides a federal remedy which is supplementary to any state remedies. Exhaustion of state remedies is not a prerequisite to relief in the federal courts.

The Civil Rights Act subjects all state officials, including state judges and state's attorneys, to the equitable powers of the federal courts when they engage in an invidious pattern and practice of racial discrimination against a class of persons.

The legislative history of the Civil Rights Act clearly indicates an intent to subject judges and state's attorneys to its

command. The conduct of the petitioners is similar to the conduct of state officials subsequent to the Civil War.

The action of petitioners is state action within the meaning of the Fourteenth Amendment and is not immunized from the operation of the Constitution.

Injunctive relief would not constitute an improper intrusion into the operation of the state judiciary or state's attorney. When state officials engage in a systematic pattern of racial discrimination they act outside their judicial and quasi-judicial capacities.

The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of government. To deny respondents equitable relief would strip the Civil Rights Act of its purpose.

ARGUMENT.

The very premise of our constitutional form of government provides the framework within which the issues of these cases must be analyzed. Government exists in delicate balance. In return for fulfilling his duties of citizenship, the citizen is guaranteed certain rights and the equal protection of the law. Courts, legislatures and related legal and public officials exist to protect these rights, to provide forums in which citizens may seek to bring about peaceful change, and to guarantee that the entire system will work. An integral part of peaceful intercourse is the criminal justice system. It is to the courts and quasi-judicial officials that citizens look for the implementation of the criminal justice system.

This society cannot exist as one of law and order if the instrumentalities of the state, particularly those of a criminal nature, are not utilized to benefit all persons irrespective of race. No state official has the authority to determine which laws will be enforced only for white persons and which laws

will be enforced only for black persons. The law must be enforced whether the victim is a black person or white person.

What is charged in these cases involves a fundamental breakdown in the civilized order of local government. Two local judges and the state's attorney are accused of exercising their offices to benefit only persons of the white race. In considering the facts and legal issues presented by this breakdown, it is important to view the circumstances from which this amended complaint arises.

In February, 1973, the United States Commission on Civil Rights published a report entitled "Cairo, Illinois: A Symbol of Racial Polarization." Among other things, the Commission recited the following facts: Extraordinarily grave civil rights problems have long beset the community of Cairo, Illinois. Cairo is a small town with 6,277 residents, 37.5 percent of whom are black according to the 1970 census. The median income for a white family in 1969 was $6,428, the median income for a black family was only $2,809. The unemployment rate for white males in Alexander County, according to the 1970 census, was 6.5 percent while for black males it was 16.2 percent.

In the 1960's there was considerable civil rights activity in Cairo. As a result of this equality quest, considerable tension between black and white citizens was generated. Confrontations were frequent. Gunfire became common and open violence flared. The state government investigated the crisis but failed to take affirmative action to protect the rights of black citizens.

The Commission's report found that the problems of Cairo are exacerbated by state and local governmental agencies who are reluctant to use the authority at their command to compel adherence to civil rights laws.[5] The Commission stated in its judgment:

5. United States Commission on Civil Rights, "Cairo, Illinois: A Symbol of Racial Polarization" (Feb. 1973). This report did not specifically refer to conduct of these petitioners.

> "law enforcement in Cairo has been practiced in a discriminatory and completely unprofessional manner. Basic police services have been arbitrarily denied to certain areas in the black community. Black residents have been faced with serious harassment and physical brutality by law enforcement officials. Police weapons have been used indiscriminately in an attempt to threaten the black community. And local law enforcement officials have aligned themselves with individuals and groups whose purpose is to oppose the enforcement of equal opportunity for all citizens regardless of race." *Id.* at 24.

The Commission said that "a crisis exists in Cairo, because local officials there are not fulfilling their constitutional and statutory responsibilities." *Id.* at 24.

It was against this background, that respondents filed their amended complaint against the petitioners.

I. The amended complaint adequately states claims for equitable relief under the Civil Rights Act.

The Seventh Circuit held that respondents' amended complaint adequately states claims for equitable relief under the Civil Rights Act. This Court, as did the Seventh Circuit, in reviewing the district court's dismissal of respondents' amended complaint, must construe the amended complaint liberally and consider all factual allegations to be true, resolving any doubts in respondents' favor. *See Boddie* v. *Connecticut*, 401 U. S. 371, 373 (1971). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); *Lucarell* v. *McNair*, 453 F. 2d 836, 838 (6th Cir. 1972); *Scher* v. *Board of Educ. of West Orange*, 424 F. 2d 741, 744 (3rd Cir. 1970).

Mere vagueness or lack of detail is not a ground for a motion to dismiss. Rule 8(f) of the Federal Rules of Civil Procedure

provides that "all pleadings shall be so construed as to do substantial justice." If they thought the amended complaint were vague, petitioners could have moved for a more definite statement, Rule 12(e), F. R. Civ. P.; 2A Moore, Federal Practice, ¶ 12.08 (1972). They did not so move.[6]

Petitioners urge that the amended complaint does not allege that any of the respondents has been a victim of their discrimination. A careful review of the amended complaint, however, refutes their contention, as noted by the court below. Paragraph 1 of the amended complaint states that respondents and members of their class have been deprived by all petitioners of certain enumerated rights guaranteed by the Constitution and laws of the United States. Paragraphs 3 and 4 state that respondents are members of the class on whose behalf the action is brought in addition to having brought the action individually and that because of their race, creed, poverty, and exercise of First Amendment rights they have been and continue to be discriminated against in the administration of criminal justice.

Paragraphs 12-17 and 19-20 state that the state's attorney's conduct deprives respondents of their constitutional rights and describe examples of his discriminatory conduct.

Paragraphs 35 and 36 state that the actions of O'Shea and Spomer, as judges, have deprived and continue to deprive respondents and members of their class of rights guaranteed by the Constitution and laws of the United States. Paragraphs 37 and 38 allege that each of the practices referred to in the amended complaint is carried out with the intent to deprive "plaintiffs and members of their class of the benefit of the

6. That the amended complaint was signed by attorneys rather than by the respondents themselves is irrelevant to a determination of its adequacy to state a claim upon which relief can be granted. Rule 11 of the Federal Rules of Civil Procedure expressly provides that complaints may be signed by attorneys and eliminates as a general rule the need to verify pleadings. The signature of an attorney constitutes a certificate by him that he has read the pleadings and that to the best of his knowledge, information, and belief there is good ground to support it. Rule 11, F. R. Civ. P.; 2A Moore, Federal Practice, ¶ 11.02 (1972).

criminal justice system of Alexander County" and that each of such practices is carried out with the "intent to deter plaintiffs and members of their class from engaging in a peaceful boycott and other activities protected by the First Amendment to the Constitution of the United States".

The amended complaint makes two essential allegations: (1) that the conduct complained of was engaged in by the petitioners under color of state law, custom and usage; and (2) that such conduct deprives respondents of rights secured by the Constitution and laws of the United States. *See Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970).

Respondents are unable to secure in the courts before Spomer and O'Shea the same enforcement of their rights which is accorded to white citizens. The amended complaint charges that Spomer and O'Shea set higher bonds in criminal cases for black persons than they do for white persons in that they follow an unofficial bond schedule which is utilized when the accused is black. They sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons charged with the same or equivalent conduct. They require black persons to pay for a trial by jury in certain types of cases. *Compare Griffin* v. *State of Illinois*, 351 U. S. 12 (1956) and *Boddie* v. *Connecticut*, 401 U. S. 371 (1971). By their systematic denial of due process and equal protection of the laws, petitioners seek to chill respondents' exercise of their right to assemble peaceably and to thwart their efforts to remove the shackles of bondage. Such conduct plainly contravenes Section 1981 in that black persons are subject to a different punishment and penalty than white persons and Section 1983 in that black persons are deprived of rights secured by the First, Eighth, Thirteenth and Fourteenth Amendments. Additionally, Section 1982 is contravened in that the imposition of higher bonds and payments for jury trials prevents black persons from holding real and personal property to the same extent as white persons. Respondents thus have properly stated a claim for

equitable relief. *Compare Lane* v. *Correll*, 434 F. 2d 598 (5th Cir. 1970).

Because respondents seek freedom to exercise long-denied constitutional rights by demonstrating against local public officials and merchants on the public ways and seek to exercise everyday rights such as moving into a home, they repeatedly are victims of assaults and batteries committed by white persons. The amended complaint charges that the state's attorney, as the instrumentality of the State, knowing of this criminal violence, makes no effort to bring the guilty to punishment nor to afford protection or redress to the outraged and innocent victims. The state's attorney is unwilling to enforce state criminal laws when the victims are black and the accused are white. He consistently and repeatedly refuses to take evidence of such criminal conduct in that he turns a deaf ear to the complaints of blacks; he refuses to investigate such complaints; he refuses to initiate criminal proceedings against such persons; he refuses to present appropriate evidence before the grand jury, although by statute, the grand jury must hear all such evidence. Ill. Rev. Stat., ch. 38, § 112-4(a) (1971). Immunity has and continues to be given to crime so long as the victim is black or one sympathetic to the injustices and inhumanity to which blacks are subjected. By such conduct, the state's attorney seeks to chill respondents' exercise of their right to assemble peaceably.

This systematic discrimination, because of respondents' race or creed, clearly deprives respondents of due process and equal protection of the laws. The state's attorney's conduct plainly contravenes Section 1981 in that black persons are not permitted to give evidence to the same extent as whites and are deprived of the full and equal benefit of all proceedings affecting their security of person and property. Section 1983 is contravened in that the state's attorney's exercise of his office intimidates respondents from exercising First Amendment rights, denies respondents due process of law and the equal protection of the laws, and deprives respondents of the right to be free

from the vestiges of slavery. The state's attorney's refusal to take evidence to initiate criminal proceedings, for example, against Charlie Sullivan when Sullivan fired gunshots and otherwise intimidated respondent Wilson's family when Wilson moved into a home in a white neighborhood in the City of Cairo, caused Wilson to be deprived of the right to hold real property to the same extent as white citizens in contravention of Section 1982. *Compare Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Additionally, the state's attorney's refusal to recommend bond and sentences without regard to race or creed causes respondents to be deprived of their right to hold real and personal property to the same extent as white citizens in that respondents are required to pay greater sums than whites in posting bond or paying fines.

II. The doctrines of judicial and quasi-judicial immunity do not insulate state judges or state's attorneys from the equitable powers of the federal courts when they engage in an invidious pattern and practice of racial discrimination in the administration of criminal justice.

State judges and a state's attorney are not immune from the equitable powers of a federal court when they denigrate their offices by engaging in an invidious pattern and practice of racial discrimination in the administration of criminal justice. The civil rights statutes, enacted to implement the Thirteenth and Fourteenth Amendments, express congressional determination to eradicate the vestiges of slavery from American society and to guarantee equal protection of the law to all. They provide a mechanism whereby the federal system may affirmatively intervene when a citizen is deprived of rights guaranteed to all, irrespective of race. *See Bell* v. *Hood*, 327 U. S. 678 (1946); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). Exhaustion of state remedies is not a prerequisite. *McNeese* v. *Board of Educ.*, 373 U. S. 668 (1963); *Carter* v. *Stanton*, 405

U. S. 669 (1972); *Monroe* v. *Pape*, 365 U. S. 167 (1961). No person, irrespective of his official position, may, by design or otherwise, subject a citizen to a deprivation of any rights secured by the Constitution or laws of the United States. *See Dombrowski* v. *Pfister, supra; Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939). The fact that the petitioners are two judges and a state's attorney does not relieve them of their fealty to the Constitution and laws of the United States. *United States* v. *McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967); Ill. Rev. Stat., ch. 14, § 1 (1971); Ill. Rev. Stat., ch. 37, § 72.2 (1971). The petitioners stand in this litigation as instrumentalities of the State. *Cooper* v. *Aaron*, 358 U. S. 1, 16-18 (1958); *M. Schandler Bottling Co.* v. *Welch*, 42 F. 561 (Cir. Ct., D. Kan. 1890).

A. The legislative history of the Civil Rights Act reflects a congressional intent that state judges and state's attorneys be subject to its command.

The legislative history of the Civil Rights Act was thoroughly analyzed in the opinion of the Seventh Circuit and will not be repeated here in its entirety. The capricious conduct of these petitioners was precisely that which was sought to be cured by the Thirteenth and Fourteenth Amendments and the Civil Rights Act. Sections 1981 and 1982 were enacted as a means of enforcing the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." The power vested in Congress to enforce this Amendment, therefore, must and does include the power to enact laws of nationwide application. *See Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Griffin* v. *Breckenridge*, 403 U. S. 88, 105 (1971).

Prior to the enactment of Sections 1981 and 1982, Black Codes were adopted throughout the southern states, which, while admitting that Negroes were no longer slaves, nonetheless used the state's power to impose and maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. One example of the convergence of the history of the Act and the amended complaint herein, is the prohibition by the Black Codes (similar to the conduct of the state's attorney here) of Negroes' testimony in a court against any white man. *See* Senator Wilson's speech before Congress, *Cong. Globe*, 39th Cong., 1st Sess. 39-40, 589 (1866); 1 Fleming, *Documentary History of Reconstruction* 273-312 (1906); McPherson, *The Political History of the United States During the Period of Reconstruction*, 29-44 (1880).

Section 1983 has its roots in Section 1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, c. 22, § 1, 17 Stat. 13. Its primary purpose was to enforce the Fourteenth Amendment. At the time of its enactment, state and local governments were not controlling the wave of murders and assaults launched against blacks by whites. Section 1 of the Act was designed in response to the unwillingess or inability of the state governments to enforce their own laws against those violating the civil rights of others.[7] The remedy created in § 1 "was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. 167, 175-76 (1961); *District of Columbia* v. *Carter*, ... U. S. ...., 93 S. Ct. 602, 607 (1973). In the final analysis, § 1 of the 1871 Act may be viewed as an effort

> "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or other-

7. The Act, moreover, was designed to protect that class of white persons who had Union sympathies. See *Littleton* v. *Berbling*, 468 F. 2d 389, 400 (7th Cir. 1972). Similarly, here, respondents charge that petitioners discriminate against a class of white persons who sympathize with the plight of blacks in Cairo.

> wise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961).

Respondents' cause of action against Spomer and O'Shea prays for equitable relief. All that is asked is that these two petitioners be directed to set bond in criminal cases, to impose criminal sentences, and to provide trials by jury in all cases in a nondiscriminatory manner without regard to race or creed.

The discriminatory conduct of Spomer and O'Shea is precisely the kind of conduct against which the Civil Rights Act is directed. In the congressional debates, as quoted by this Court in *Monroe* v. *Pape, supra,* Mr. Burchard of the State of Illinois said:

> "[I]f the [state's] statutes show no discrimination, *yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another,* or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, *the State has not afforded to all its citizens the equal protection of the laws."* (Emphasis added.) *Id.* at 176-77.

With respect to the state's attorney, respondents charge that he refuses to permit them to give evidence of criminal conduct of white persons against black victims, to initiate criminal proceedings against white persons who commit criminal conduct against them, to present evidence to the grand jury and to recommend bond and sentences in a nondiscriminatory manner without regard to race or creed.

The framers of the Civil Rights Act recognized that the agents of the State charged with the responsibility for prosecuting the criminally accused on behalf of the people might be derelict in

their duties when the victims were black and therefore designed the Civil Rights Act to rectify such an evil. In the congressional debates, as quoted by this Court in *Monroe* v. *Pape*, 365 U. S. 167 (1961), Senator Sherman of Ohio said:

> ". . . it is said that the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify." *Id.* at 173-74.

This Court, moreover, stated that the purposes of the Civil Rights Act were broad—that the aim

> "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."
>
> ". . . It was not the unavailability of state remedies but the *failure of certain States to enforce the laws with an equal hand* that furnished the powerful momentum behind this 'force bill.' (Emphasis added.) Mr. Lowe of Kansas said:
>
> > 'While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.'
>
> "Mr. Beatty of Ohio summarized in the House the case for the bill when he said:
>
> > '. . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged,

> and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.' " *Id.* at 174-75.

This Court continued:

> "While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law."
>
> * * * * *
>
> "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." *Id.* at 175-76.

B. Decisions of this Court hold that no state official, in the exercise of his office, may discriminate on the basis of race against a class of persons.

Action of state courts and quasi-judicial officers in their official capacities has long been regarded as state action within the meaning of the Fourteenth Amendment and subject to the equitable powers of the federal courts. State judicial and quasi-judicial action is not immunized from the operation of the Constitution and Civil Rights Act simply because it is that of the judicial or executive branches of the state government. *See Shelley* v. *Kraemer,* 334 U. S. 1 (1948) and cases discussed therein by Mr. Justice Vinson; *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Indeed, in 1880 this Court stated in *Ex parte Virginia,* 100 U. S. 339, 25 L. Ed. 676, 679 (1880):

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public

> position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Id.*

In *Mitchum* v. *Foster*, 407 U. S. 225, 92 S. Ct. 2151, 2160-62 (1972), this Court stated that the Civil Rights Act fundamentally altered the federal system. As a result of the constitutional amendments and statutes passed subsequent to the Civil War,

> "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."
>
> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, whether that action be executive, legislative, or *judicial*.' " (Emphasis in original.)
>
> . . .
>
> "[C]ongress plainly authorized the federal courts to issue injunctions."

In *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958), this Court stated:

> "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by *state legislators or state executives or judicial officers*, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' " (Emphasis added.)

The Seventh Circuit decision in the present case is consistent with decisions of the Fifth Circuit, which has grappled, perhaps, more than most circuits with the problems of discriminatory conduct of state officials. *E.g.*, *Machesky* v. *Bizzell*, 414 F. 2d 283 (5th Cir. 1969); *Shaw* v. *Garrison*, 467 F. 2d 113 (5th Cir. 1972); *Sheridan* v. *Garrison*, 415 F. 2d 699 (5th Cir. 1969), *cert. denied*, 396 U. S. 1040 (1970); *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968); *Bramlett* v. *Peterson*, 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969).

The decision of the Seventh Circuit is not in conflict with this Court's decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967). In *Pierson*, the Court was concerned with an action for damages, not one for equitable relief, against a state judge. Moreover, the record in *Pierson*, unlike here, was "barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners when their cases came before this Court." *Id.* 553. In the subject case it is alleged that the petitioners are engaging in a pattern and practice of racial discrimination and that they are not merely exercising discretion within the bounds of the Constitution and laws of the United States.

Petitioners' reliance upon *Bradley* v. *Fisher*, 80 U. S. (13 Wall.) 335 (1872), is misplaced. *Bradley* was a common law action for damages by an attorney whose name was stricken from the role of attorneys as a result of remarks he made in the course of a trial. It was not an action in equity; it was not an action under the Civil Rights Act; it was not a case where the judge systematically engaged in a pattern and practice of racial discrimination against an entire class of persons. Petitioners, however, argue that the sanctions of contempt are as dangerous to judicial independence as the risk of a suit for damages. That argument assumes that the petitioners will defy an order of a federal court not to discriminate in the exercise of public office upon the basis of race. If that assumption were valid, then such would be all the more reason for the intervention of a federal court to protect the rights of citizens.

Tenney v. *Brandhove*, 341 U. S. 367 (1951), reversing 183 F. 2d 121 (9th Cir. 1950), does not stand for the principle that state legislators, and by analogy state judges and state's attorneys, are immune from the equitable powers of the federal courts when such persons engage in a systematic pattern and practice of racial discrimination against black persons. *Compare Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939). *Tenney* was an action to recover damages for alleged civil rights violations against a single individual; equitable relief was not sought. That decision, moreover, expressly limited itself to the facts of that case. The Court stated:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character for which the members who take part in the act may be held responsible." *Id.* at 378-79.

Subsequent to *Tenney*, this Court, in, for example, reapportionment and voting rights cases, has clearly established that such officials may be enjoined from racially discriminatory conduct, and, indeed, be required to rectify affirmatively the wrong caused by their conduct. *E.g.*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *United States* v. *Raines*, 362 U. S. 17 (1960); *Baker* v. *Carr*, 369 U. S. 186 (1962). *See also Jordan* v. *Hutcheson*, 323 F. 2d 597, 601-02 (4th Cir. 1963) and cases cited therein.

This is not a case in which injunctive relief would constitute an unwarranted intrusion into the operation of the state judiciary or office of state's attorney. A federal district court is not being asked merely to substitute its judgment for the judgment of state judges and a state's attorney arising out of discretionary action in an isolated case by a disgruntled litigant. A federal district court is not being asked to enjoin pending state criminal prosecutions. Rather, because the petitioners, as judges and as a state's attorney, abuse their official positions to engage systematically in a pattern of discrimination whereby persons because of their race or creed are treated in a manner different from others, a federal

court is being asked to intervene. Federal respect for state institutions does not provide a shield for such pervasive invasions of citizens' constitutional rights. *Compare Jordan* v. *Hutcheson*, 323 F. 2d 597 (4th Cir. 1963).

C. Petitioners' contentions that a federal court should not infringe upon the discretion of state judges and state's attorneys are inapplicable to the circumstances of this case.

When state officials pervert their office by acting in a fashion in violation of the Constitution and laws of the United States, they have acted outside their judicial and quasi-judicial capacities and may be enjoined by a federal court. The exclusion of black persons from the benefits of citizenship is not within the limits of their discretion. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 151-2 (1970); *Ex parte Virginia*, 100 U. S. 339 (1880). As Judge Pell stated for the court below:

> "The word discretion is limited by the duty to follow the law and such a blanket pattern of discrimination as is here alleged cannot be said to conform to such a duty. A discretionary action is subject to review and reversal for abuse of discretion. 'And by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable.' *United States* v. *McWilliams*, 163 F. 2d 695, 697 (D. C. Cir. 1947). For us to find that the acts and failures to act alleged in the complaint do not constitute an abuse of discretion, we would have to say that they do not constitute 'arbitrary action.' *Burns* v. *United States*, 287 U. S. 216, 223 (1932), and this we can only do by ignoring the mandates of equal protection of the laws." *Littleton* v. *Berbling*, 468 F. 2d 389, 412 (7th Cir. 1972).

In *Osborn* v. *Bank of the United States*, 22 U. S. (9 Wheat.) 738, 866 (1824), Chief Justice Marshall stated:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is

> discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." (Emphasis added.)

The allegations relating to the conduct of the state's attorney do not relate to that prosecutorial discretion which would apply to an individual case. The state's attorney is charged with refusing to take complaints from black persons, with refusing to investigate criminal conduct of whites against blacks, with refusing to present evidence of such criminal conduct to the grand jury, and with refusing to recommend bail and sentence without regard to race. When he thereby deprives respondents of the opportunity of access to the judicial system, he stands in no different a position than the prison warden who deprives a prisoner access to the courts or the police officer who unlawfully carries out an investigation. *Compare Johnson* v. *Avery*, 393 U. S. 483 (1969); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966); *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (7th Cir. 1969); *Lewis* v. *Kugler*, 446 F. 2d 1343 (3rd Cir. 1971).

Petitioners argue that there are alternative remedies so preferable to equitable relief that this action should be dismissed. They argue that an action for damages is preferable. *Pierson* v. *Ray*, 386 U. S. 547 (1967), however, precludes an action for damages against state judges. Petitioner W. C. Spomer, the current state's attorney, suggests that an action in damages against a state's attorney is preferable to equitable relief. The Seventh Circuit, however, held that only when a state's attorney improperly exercises his investigatory functions may an action for damages be brought. This Court, moreover, has never decided that question. Indeed, the issue raised in *Berbling* v. *Littleton*, No. 72-1107, pending before this Court is whether or not an action for damages may be brought against a state's attorney. Spomer's predecessor in that petition argues that one

may not be brought. An action at law, moreover, is plainly inadequate where respondents suffer continuous deprivation of their rights. The possibility of piecemeal after-the-fact damage suits will not necessarily deter the type of discrimination alleged here. In addition, undue burdens would be imposed upon the district court to decide multiple lawsuits.

Nor is the ballot box adequate. As the Seventh Circuit noted at page 413 of its opinion:

> "Cairo, Illinois, has admittedly been the scene of substantial civil rights agitation for the last several years. Not surprisingly there has been a polarization of the community, and, in such a case, it would be totally presumptuous of this court to find that the ballot provides even a probability of remedying the alleged oppression of the minority by the duly elected representatives of the majority. It was, in fact, just such oppression which caused the Congress to enact the provisions with which we now deal."

The remedy of criminal prosecution of petitioners for their misconduct is not adequate. As the Seventh Circuit noted at page 413 of its opinion:

> "Such remedies are merely nominal. The criminal sanctions can rarely be invoked to control the errant police officer, the errant prosecutor, and never the oppressive judge. The civil damage suit is worthless, especially if the victim of oppression is a social misfit or an unsavory character." Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 434 (1960).

There is no private enforcement of criminal laws in Illinois.

The amended complaint meets not only the standards for federal involvement under *Mitchum* v. *Foster*, 407 U. S. 225 (1972), but also those espoused in *Younger* v. *Harris*, 401 U. S. 37 (1971), and its companion cases. *See also Hadnott* v. *Amos*, 393 U. S. 815 (1968) and *Hadnott* v. *Amos*, 394 U. S. 358 (1969).

That the federal courts may require state officials to take affirmative action, if necessary, is not without precedent. *See Louisiana* v. *United States*, 380 U. S. 145 (1965); *Reynolds* v. *Sims*, 377 U. S. 533 (1964). This is most emphatically reflected in school desegregation cases. As a result of *Brown II*, the State automatically assumed an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." *Brown* v. *Board of Educ.*, 349 U. S. 294, 301 (1955); *see also Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1, 15 (1971). *Brown II* did not merely prohibit discrimination. The type of relief sought here would not require, however, reallocation of state resources, restructuring of political boundaries or the construction of new facilities as required in those cases. *See, e.g., Keyes* v. *School District No. 1, Denver, Colo.*, ... U. S. ...., 41 U. S. L. W. 5002, 5009, 5017 (June 21, 1973). The relief suggested by the Seventh Circuit, assuming respondents prove their charges, is more in the nature of a reporting system to assure that racial discrimination is not pervasive in the administration of criminal justice. *Compare Louisiana* v. *United States*, 380 U. S. 145 (1965).

In sum, courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to black and white, to rich and poor. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to blacks or indigents altogether. Where race determines whether criminal conduct shall be punished or money determines the kind of a trial a man gets or race determines whether he gets into court at all, the great principle of equal protection becomes a mockery.

CONCLUSION.

For the foregoing reasons, respondents urge the Court to affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U. S. Const. amend. XIII:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U. S. Const. amend. XIV.

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U. S. C. § 1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. § 1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at lawsuit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985:

§ 1985(2) ". . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Ill. Const., Art. 1, § 13:

The right of trial by jury as heretofore enjoyed shall remain inviolate.

Ill. Rev. Stat., ch. 14 § 1:

Before entering upon the respective duties of their office, the attorney general and state's attorneys shall each be commissioned by the governor, and shall take the following oath or affirmation:

I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general (or state's attorney, as the case may be), according to the best of my ability.

Ill. Rev. Stat., ch. 37 § 72.2:

. . . The several judges of the circuit courts of this State, before entering upon the duties of their office, shall take and subscribe the following oath or affirmation, which shall be filed in the office of the Secretary of State:

I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of judge of ..... court, according to the best of my ability.

Ill. Rev. Stat., ch. 38 § 112-4(a):

The Grand Jury shall hear all evidence presented by the State's Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

MICHAEL O'SHEA, As Magistrate of the Circuit Court For Alexander County, Illinois, et al.,

Petitioners,

vs.

EZELL LITTLETON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

At the outset, we respectfully submit that we feel it our duty to point out that plaintiffs' Brief misquotes the record. On page 5 and again on page 13, it is stated that the judges discriminate by following "an unofficial bond schedule applicable to black persons. . . ." An identical allegation was made on page 5 of plaintiffs' Brief in Opposition to our Petition for Certiorari.

We pointed out on pages 6 and 11 of our Brief that there was no such charge made in either the original or the amended complaint. On page 6 we stated the complaint charged with regard to bonds that the judges ". . . follow an unofficial bond schedule in criminal cases; no charge is made, as has been done with respect to sentencing practices, that there exists discrimination in the treatment of white and black persons." A similar statement was made on page 11. In addition, footnotes numbered 3 and 4 on pages 6 and 11 again stated the misquoted words did not appear in the complaint.

We realize that when, as is apparent here, counsel have a strong personal commitment to their cause, it is difficult to have an impartial objectivity, and that, by inadvertence, a mistake may result from confusing what is in the mind with what is in the record.

The supposed charge of discrimination in fixing bail is present only in the mind of counsel, and its constant reiteration seems to indicate that it is the chief foundation of their brief.

As noted above, plaintiffs' brief opposinrg our Petition for Certiorari made the identical misquotation from the complaint as plaintiffs' present brief does on pages 5 and 13.

As shown on page 12 of Appendix II, the actual allegations in the complaint were:

> They set bond in criminal cases without regard to the Constitution and statutes of the State of Illinois requiring that bond be merely an assurance that defendant will appear in court when required, not that it be a punishment, in that they follow an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant, all in

> violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

There is no allegation in that language that any discrimination had been practiced against blacks, but only that the judges used an unofficial bond schedule in *all* criminal cases. It is entirely different from the following allegation "b" that the judges "set sentences higher for plaintiffs . . . than for white persons and imposed harsher conditions." Allegation "b" does make an assertion (wholly unsupported by reference to a single incident) that discrimination is practiced in sentencing. It is fundamental that separate allegations be read as a whole and where one clause includes a specific charge of discrimination which does not appear in the other, no amount of wishful thinking will put it there.

The Summary of Argument (page 8) seems to plead confession and avoidance by stating "mere vagueness or lack of detail is not a ground for a motion to dismiss." Though the Summary makes no reference whatever to any alleged discriminatory practices of the judges, the Argument itself repeats several times the unalleged and unsupported claim of discrimination in setting bail. As an example, the Brief on page 13 contains the entirely fictitious statement:

> The amended complaint charges that Spomer and O'Shea set higher bonds in criminal cases for black persons than they do for white persons in that they follow an unofficial bond schedule which is utilized when the accused is black.

The unrestrained enthusiasm and bias of plaintiffs is demonstrated by the amazing claim at the bottom of page 13 that "Section 1982 is contravened in that the imposition

of higher bonds . . . prevents black persons from holding real and personal property to the same extent as white persons." Plaintiffs seem perfectly willing to assume that an allegation of using unofficial bond schedules in all criminal cases must necessarily mean that blacks, and only blacks, are required to furnish "higher bonds."

The urge to dwell continuously on a charge not made in the complaint is shown by the prayer on page 18 that ". . . [the] two petitioners be directed to set bond in criminal cases . . . in a nondiscriminatory manner without regard to race or creed." This would truly be relief without allegation in the complaint or substantiation in the record.

No attempt has been made to answer our argument on page 9 of our Brief that the complaint "did not contain a single specific charge against either of the judges, but only general and conclusory allegations." On page 11 our Brief quoted the Opinion of the lower court which states:

> . . . in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise "every complaint against a state official by the simple expedient of averring conclusions would be cognizable in the federal courts. . . ."

Plaintiffs' Brief makes no attempt to distinguish or explain away the language of the Opinion or to answer our statement at the bottom of page 11 that " . . . there was not a single factual averment as to trials or sentences in the past but only . . . a request that the court enjoin the conjectural possibility of discrimination against someone in the future."

No attempt whatever is made to show the "highly specific factual averments" necessary for a finding against the judges. Instead, plaintiffs' Brief uses several pages

to itemize the specific complaints against the state's attorney and then, ignoring entirely the absence of any similar charges against the judges, blatantly states on page 16:

> The capricious conduct of *these petitioners* was precisely that which was sought to be cured by the Thirteenth and Fourteenth Amendments and the Civil Rights Act. (Emphasis Added)

Plaintiffs' Brief seems chiefly based on implication, innuendo, wishful thinking, and "guilt by association." It is unresponsive to our Brief and makes no attempt to analyze or meet the issues presented in that Brief.

The product of plaintiffs' confusion with regard to specific allegations is the ingenuously muddled characterization of their own class. Manifest in their own analysis of the class at bar, plaintiffs have attempted to reconcile at least three incongruous groups. On one hand, they characterize their class as those persons, black and white, who are seeking to boycott certain businesses in Cairo in order to combat discrimination; on the other hand, they characterize their class as one entirely of blacks who have been discriminated against by the selective enforcement of the criminal justice system. In addition, they all claim to represent all persons (presumably black, white, or any other group) who are poor and are unable to afford bail, counsel, or jury trials in city ordinance cases. (see AII, 3, 16, 30; Pl. Br. 5, 13)

As a boycott class, both blacks and whites could possibly join together to challenge discriminatory practices against that group. Yet, (assuming *arguendo* a suit was permissible at all) even as this all encompassing body, plaintiffs have not shown or alleged that any person in that group has ever been before either of these defendant judges or has ever been discriminated against by them.

As an all black class, plaintiffs have erroneously included two white persons—Harris and Brown. Under the guise of a characterization that these are persons sympathetic to the black cause, plaintiffs attempted to bestow upon these alleged members instant standing. It is well settled, however, that in determining whether an action may be maintained as a class action, it is necessary that each individual has standing to bring suit in his own right. Fed. Rules Civ. Prac., Rule 23, 28 U.S.C.A.; *Thomas* v. *Clarke*, 54 F.R.D. 245 (D.C. Minn. 1971); and *Mintz* v. *Mathers Fund, Inc.*, 463 F. 2d 495 (CA Ill., 1972); see also: Dft's Br. pp. 15-17. Plaintiffs Harris and Brown, simply are not black persons. No amount of careful categorization, representation, or wishful thinking invests them with standing in that class.

Pervading the entire posture of plaintiffs' claim, is the mistaken reliance upon a phantom premise — i.e. that these judges engage in a "pattern and practice" of discriminatory conduct. The only response to our delineation of the facts which showed no evidence of this "pattern and practice" is contained on pages 12 and 13 of plaintiffs' Brief:

> A careful review of the amended complaint, however, refutes their contention, as noted by the court below.

Following this short statement, plaintiffs merely recite the allegations contained in the complaint and conclude on page 13: "[r]espondents thus have prorperly stated a claim for equitable relief." Their analysis, in effect, may be characterized as saying: "it is so — because we say so." Defendants respectfully submit that no facts have been alleged against these judges which could support a claim for relief.

Indeed, these defendant judges have specifically demonstrated on pages 15-17 of their Brief that none of the plaintiffs have standing to bring this action. No plaintiff has alleged that he or she has ever been discriminated against by either of these judges with respect to *any* allegation. Moreover, not one plaintiff even alleged that he or she had ever been before either of these defendants in a judicial proceeding.

Obviously, the plaintiffs and defendants at bar do not stand in adverse capacities sufficient to warrant federal jurisdiction. Plaintiffs have failed to show that a real controversy exists. Instead, plaintiffs have asked the federal courts to intervene in an abstract situation — one completely devoid of adverse interests—and render an advisory opinion. See: *Muskrat* v. *United States*, 219 U.S. 346 (1910); *Aetna* v. *Haworth*, 300 U.S. 227 (1937); and *Younger* v. *Harris*, 401 U.S. 37 (1971); see also: Dft's Br., 15-17. Notably, plaintiffs did not respond to the argument as set out in our Brief.

In an effort to circumvent the obvious fact that they are asking the federal court to supervise a state judge's *discretionary* judgments, the plaintiffs argue that these judges have acted outside their authority, (Pl. Br., 24) and therefore do not come within the ambit of judicial immunity. However, plaintiffs fail to recognize that the courts have long afforded judges immunity even in cases of abuse of their authority. *Bradley* v. *Fisher*, 13 Wall. 335, 80 U.S. 649 (1871); and *Pierson* v. *Ray*, 386 U.S. 547 (1967). A judge may lose his immunity when he acts without *jurisdiction*. *Holmes* v. *Silver Cross Hospital of Joliet*, 340 F. Supp. 125 (D.C. Ill. 1972); compare: *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (D.C. Ohio 1971);

see also: *Pierson* v. *Ray*, supra, at 554. Plaintiffs have not alleged, indicated, or implied any set of facts which revealed either judge lacked jurisdiction. Indeed, in light of the fact that no plaintiff has ever been before these defendants, their statement that these judges have acted "outside" their authority is an absurd attempt to substantiate facts not in existence.

In conclusion, the court below countenanced federal actions against state judges upon allegations neither pleaded in fact nor even in existence. Indeed, the plaintiffs here have presented a class (or classes) so encompassing as to make impossible an accurate definition. Moreover, the lack of any case or controversy existing between these litigants renders plaintiffs' relief advisory and, hence, inopportune.

It is, therefore, respectfully asked that the decision of the District Court be affirmed, and the decision of the United States Court of Appeals for the Seventh Circuit be reversed as to these judges; and furthermore, that this Court hold the doctrine of judicial immunity protects all judges in the performance of judicial acts.

Repectfully submitted,

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Supreme Court, U. S.
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No. 72-953

In the Supreme Court of the United States

MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Petitioners,

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his father and next friend, HOBERT LAMBERT, MORRIS GARRETT, by his father and next friend, LEVI GARRETT, Individually and as Representatives of a Class,

Respondents.

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-953

MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

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vs.

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Respondents.

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Now comes the Illinois State Bar Association, Movant herein, by its attorneys, Jack E. Horsley and Richard F. Record, Jr., of Craig & Craig, and respectfully moves that the Court enter an order allowing Movant to file its Brief as Amicus Curiae in support of the Petitioners and in support of said Motion, states as follows:

1. That the consent of the attorney for the Petitioners has been obtained and his letter to that effect is on file with the Clerk of this Court and consent of the attorney for the Respondents has been declined but that attorney has stated, as more fully shown by the affidavit attached hereto and made a part of this Motion, that the Respondents do not object to the filing of the Motion or the allowance of this Motion by this Court nor the filing of a Brief by this Movant pursuant to said Order of this Court.

2. That the interest of the Illinois State Bar Association in this case arises from the fact that it is the principal lawyers' organization in the State of Illinois and as such is vitally interested on a professional basis in the maintenance of an independent judiciary in the State of Illinois and, because of its obligation to the courts generally as well as the public and its own membership, has a direct and immediate interest in this litigation and is in a position to and has a positive obligation to present data and suggestions in support of the position taken by the Petitioners in this matter.

3. That the Petitioners and Respondents have discussed the issues before this Court primarily in terms of judicial immunity and while that is an important issue neither side has discussed what is a much more fundamental question, viz., whether the federal judiciary can or should undertake to supervise the judicial function or any phase thereof as carried out by the judiciary of the State of Illinois and thereby destroy the independence of said state judicial system and make impossible the administration of criminal justice in the state courts of Illinois.

4. That both the Petitioners and Respondents have discussed the effects of the decision of the Seventh Circuit upon the judiciary of the State of Illinois and although the effects upon the federal judiciary have been mentioned briefly insufficient attention has been given to the substantial adverse effect upon the federal judiciary of the Seventh Circuit's opinion.

5. That Movant has prepared a Brief amicus curiae, true copy of which is attached hereto and incorporated herein by reference as though fully set forth, containing a more complete argument on the aforesaid issues and if said argument is accepted, same would be dispositive of this case.

Respectfully submitted,

JACK E. HORSLEY
and
RICHARD F. RECORD, JR.
Of Craig & Craig
1807 Broadway
Mattoon, Illinois 61938
Attorneys for Illinois State Bar Association, Amicus Curiae.

State Of Illinois)
) ss.
County Of Cook)

I, JACK E. HORSLEY, one of the attorneys herein for the Movant ILLINOIS STATE BAR ASSOCIATION, being first duly sworn, state under oath and depose that on Tuesday, September 4, 1973, James B. O'Shaughnessy of Schiff, Hardin & Waite of Chicago, Illinois, attorney for the Respondents in this matter, after receiving a request from the Movant for consent by the Respondents herein to the filing of the Brief of the aforesaid ILLINOIS STATE BAR ASSOCIATION as amicus curiae of this Court authorized the attorneys for the Movant ILLINOIS STATE BAR ASSOCIATION to advise the Court that the Respondents would not consent to the filing by the ILLINOIS STATE BAR ASSOCIATION of an amicus curiae brief herein but would not object to the Court's allowing Movant's motion for leave to file an amicus curiae brief.

Dated this 8th day of September, 1973.

Jack E. Horsley
JACK E. HORSLEY

Subscribed and sworn to before me
this 8th day of September, 1973.

Doris M. Moynihan
Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-953

MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

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EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his father and next friend, HOBERT LAMBERT, MORRIS GARRETT, by his father and next friend, LEVI GARRETT, Individually and as Representatives of a Class,

Respondents.

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

I.

CONSENT TO FILE

Consent to file this brief amicus curiae has been granted in writing by attorneys for the Petitioners. Respondents, by their authorized attorney, have declined to consent but do not object and will not object to this Court's allowing Movant's Motion for Leave to File an Amicus Curiae Brief.

II.

INTEREST OF THE AMICUS CURIAE

The Illinois State Bar Association is the principal lawyers' organization in the State of Illinois. Although a voluntary association, its membership includes over fifteen thousand of the twenty thousand lawyers in Illinois and since its founding in 1878 has been among the most vigorous and effective of voluntary bar associations in the nation.

In recent years, the Association has become particularly active in the field of judicial administration and has for some time regularly conducted judicial advisory polls to better advise the public of the qualifications of candidates for the judiciary of the State of Illinois. The Association has played an active and integral part in supporting and establishing far-reaching constitutional and statutory changes in Illinois affecting the judiciary. This work has been done through Sections of the Association directly concerned with Judicial Administration, Individual Rights and Responsibilities and Appointments to the Federal Judiciary. The Association has worked diligently and effectively to support and maintain both independence of the judiciary of the State of Illinois and high standards for sitting judges.

The interest of this Association in the present case is manifest: the decision of the Seventh Circuit threatens to substantially impair if not completely destroy the independence of the judiciary of the State of Illinois. The Association is vitally interested in that subject on a professional basis and because of its obligation to the courts

generally as well as the public and its own membership has a direct and immediate interest in this litigation and is in a position to and has a positive obligation to present data and suggestions in support of the position taken by the Petitioners in this matter.

III.

SUMMARY OF ARGUMENT

1. The Civil Rights Act did not abrogate complete judicial immunity of state court judges from suits at law or in equity or otherwise or their total and complete independence in deciding cases.

2. The impairment of judicial immunity and independence in deciding cases of state judges resulting from the decision of the Seventh Circuit below is inconsistent with:

(a) Article IV, Sec. 4 of the United States Constitution,

(b) Independence of the federal judiciary as heretofore known,

(c) The proper balance between the state and federal judiciaries, and

(d) Continued effective protection under present law of constitutional rights of a criminal defendant.

3. The decision below erroneously authorizes suits having most grave effects on the administration of criminal justice by both the federal and state judiciaries based on conclusory, non-specific allegations only regarding the state of mind of a defendant judge rather than the conduct of such defendant.

4. The decision below would effectively cripple administration of criminal justice by both the state and federal judiciaries.

IV

ARGUMENT

May It Please The Court:

A.

The Civil Rights Act Did Not Abrogate Judicial Immunity Of State Court Judges From Suits At Law Or In Equity Or Otherwise Nor Authorize Supervision Of The Judicial Function Itself.

In *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967) this Court held that the Civil Right Act of 1871, 17 Stat. 13, 42 U.S.C. sec. 1983, did not abrogate the doctrine of judicial immunity of state judges so that the remedy given by section 1983 to an aggrieved party in "an action at law, suit in equity, or other proper proceeding . . ." cannot be invoked against a state judge. In reaching that conclusion, this Court stated:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, . . . This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied liti-

> gants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> "We do not believe that this settled principle of law was abolished by .....§.....1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held . . . , that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine. 386 U.S. at 553-555, 87 S.Ct. at 1217-1218.

This Court based its opinion in large part upon *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783 (1951) which held that immunity of legislators for acts within their legislative role was not in fact abolished. In a scholarly opinion by Justice Frankfurter, the legislative history was reviewed in detail. (The Seventh Circuit suggests that the review was not comprehensive nor fully informed since it did not refer to the legislative history of previous Civil Rights Acts, 468 F.2d at 405.) Also in *Pierson*, this Court favorably commented upon the then uniform holdings of the Courts of Appeals that judicial immunity is a complete defense to an action under section 1983, 386 U.S. at 555, 87 S.Ct. at 1218, including the opinion of the Third Circuit in *Bauers* v. *Heisel*, 361 F.2d 581 (3rd Cir., 1966) which the Court of Appeals below itself described as an opinion containing "one of the most complete compilation of cases ever made in this area," 468 F.2d at 405-406.

As noted in Petitioners' Brief herein, there are cases in the books where prohibitory injunctions have issued against judges prohibiting them from exercising the judicial function or in some cases from performing a ministerial act and where writs of mandamus have issued commanding a judge to perform his judicial duties. (A noteworthy example is *Michum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972) where a state court judge was enjoined from proceeding at all in a certain case.) There are no cases, however, except the one appealed from, holding that the judicial function itself is subject to supervision other than through normal channels of appeal or post-conviction review. Whatever limits there may be to the doctrine of judicial immunity it certainly encompasses the act of deciding cases and any phase of the decisional function itself. It has been noted that there can be no disagreement ". . . as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler* v. *Judicial Council of Tenth Circuit of the United States*, 398 U.S. 74, 84, 90 S.Ct. 1648, 1653 (1970), c.f. also Cook, "Perceptions of the independent trial judge role in the seventh circuit," *6 Law & Society Review 615* (May, 1972). Whatever limitations the law may recognize either on constitutional or nonconstitutional bases, there is no precedent for nor reason supporting any assertion of supervisory authority over the judicial function itself. So long as any vestige of judicial immunity is recognized in the law, the decisional act and any phase of the decisional function are totally insulated from such supervision. It may well be that as cases are presented to the courts it may be found desirable for equity to invoke jurisdiction over just what areas of judicial decision making a state or federal judge

will actually enter upon but it is inconceivable that even in the future this or any other Court will hold that the Seventh Circuit is correct under precedent or reasoning or wise as a matter of policy in holding that it is desirable to allow supervision of the very judicial act itself. It is common place to note that an independent judiciary is part and parcel not only of our jurisprudence but our very society; it is equally true but perhaps not so much noted that a non-independent judge insofar as his decision making is concerned is totally unknown to our law. The holding of the Seventh Circuit not only is bad law and bad policy but is the very antithesis of law since it would preclude the essence of law, the judicial function.

The Seventh Circuit, while evidently not convinced by the historical analysis of this Court in *Tenney* and *Pierson* and purporting to accept the authority of those decisions in fact does not because it suggests the injunction request by Respondents is a distinguishing factor. Whatever the rationale advanced by this Court or the accuracy or lack thereof of this Court's reading of history supporting its decisions in *Tenney* and *Pierson*, this Court has in fact held that the doctrine of judicial immunity still obtains notwithstanding enactment of section 1983. The Seventh Circuit suggests that because this Court has never passed upon the defense of judicial immunity to an injunction suit attempting to operate upon the very decision making process itself that such a suit may be allowed consistent with refusal to allow damage suits against judges and that both things can be reconciled with the doctrine of judicial immunity. This is fallacious. If in fact damage suits, which are in the nature of things post-judicial act occurrences, are thought to be such an

intimidating factor upon the judicial function of a judge that they should not be allowed because of the doctrine of judicial immunity how much more repugnant to that doctrine is equitable intervention which operates immediately and directly upon and contemporaneously with the very judicial act itself. If in fact the type of injunctive relief sought by Respondents here is permissible then damage suits also would be permissible. The very limited types of injunction suits allowed in some of the cases have prohibited acts of judges totally beyond their jurisdiction or acts regarded as ministerial and there have been no cases where direct injunctive supervision has been allowed over the very judicial function itself.

The Seventh Circuit seems to imply that the supervising federal district judge need not sit "in constant, day-to-day supervision of . . . state court judges . . ." 468 F.2d at 414. In that event, how is the supervising federal judge to do anything more than attempt to exercise some crude type of appellate review. One of the great distinctions between the trial judge and his judicial function and all other judges and theirs, even those that review the trial judgment, is that the trial judge sees the parties and evaluates the objective personal presence of the defendant and other persons and witnesses in court. The Seventh Circuit seemingly would have the supervising federal judge take a controlling part in the decision-making process without any face to face contact with the persons to be affected by the supervision. This is another illustration of the unworkability of the Seventh Circuit's holding.

The Seventh Circuit states that: ". . . plaintiffs have not sought to enjoin the state from prosecuting anyone,

but merely to enjoin the judges from unconstitutionally affixing bail and sentences. . . ." 468 F.2d at 408. Although the Seventh Circuit doesn't express in so many words the thought that all Respondents seek here is a prohibitory injunction that is the purport of what is stated. In fact the equitable relief sanctioned by the Seventh Circuit goes far beyond any prohibitory equitable order and is as much and more a mandatory injunction, with all of the attendant supervisory procedures that involves, as a mandatory order from the Seventh Circuit to a state judge to provide equal protection of the laws in sentencing or granting bail or an order that black criminal defendants are to be given the same sentences as white criminal defendants. However the Seventh Circuit would characterize the type of relief it authorizes, and its description is far from clear, clearly the relief sanctioned goes far beyond a mere prohibitory injunction but involves detailed supervision of the judicial function itself. This is something equity has never undertaken, is not competent to do and should not do if the parallel judicial systems are to remain independent and effective in our federal system.

B.

Destruction Of Judicial Immunity Of State Judges By The Decision Of The Seventh Circuit Is Inconsistent With The Constitution, Affects The Independence Of The Federal Judiciary And Its Relations With State Judiciaries And Has The Opposite Effect Of That Intended Upon Rights Of Criminal Defendants.

If the decision of the Seventh Circuit were correct as a matter of law the decision would still be erroneous

since it is inconsistent with the Constitution in that Section 4 of Article IV guarantees to every State a "Republican Form of Government . . . ." As noted in *Bauers* v. *Heisel*, 361 F.2d 581, 588-589 (3d Cir., 1966):

> "The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary and the various States, and consequently deprive them of a republican form of government."

The Third Circuit also noted that if in fact the Guarantee clause was violated by Congress, a serious question of justiciability would be presented and the competence of the federal judiciary to remedy a violation by Congress would be most doubtful. In *Bauers* the Third Circuit emphasized the importance of adopting a construction which would avoid such a result. This consideration was not even mentioned by the Seventh Circuit below, however, apparently on the theory that the Third Circuit was wrong in concluding that destruction of judicial immunity deprived a state of its republican form of government.

While the Seventh Circuit did not speak of any change in the status of the federal judiciary clearly an aggrieved criminal defendant unsatisfied with the conduct of a federal district judge in past cases, which to the criminal defendant might show a "pattern" of discrimination, could seek injunctive relief in advance of hearing of his own case on petition for a writ of habeas corpus in the federal district court seeking review of a state court conviction.

This would be consistent with the interpretation of the Seventh Circuit of section 1983 of Chapter 42. Despite recent seeming limitations upon the historic position of complete independence of federal trial judges, there is no disagreement ". . . as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function," *Chandler* v. *Judicial Council of Tenth Circuit of the United States*, 398 U.S. 74, 84, 90 S.Ct. 1648, 1653 (1970), reh. den. 399 U.S. 937, 90 S.Ct. 2248 (1970). Under the Seventh Circuit's theory in this case, however, an exception would be created wherever a federal district judge was dealing with the rights of a criminal defendant under a state statute, ordinance, regulation, custom or usage. It is interesting to note in the present case itself that the Seventh Circuit ordered the proceedings on remand to be assigned to a different district judge, 468 F.2d at 415, notwithstanding circuit rule 23 effective May 4, 1972 providing that whenever a case tried in the district court in the Circuit is remanded by the Court of Appeals for a new trial or hearing it is to be automatically reassigned for trial before a judge other than the judge who heard the prior trial. Does this suggest that the district judge who hear this case originally could be enjoined from hearing cases involving alleged civil rights of aggrieved criminal defendants? Would the Seventh Circuit's rather heavy handed action in that respect help respondents to deal with their "admittedly difficult" problem of proof, see 468 F.2d 389 at 408? Would not every utterance of a court of review regarding a particular trial judge in the course of passing on a particular case be admissible in evidence at some subsequent hearing of the type authorized by the Seventh Circuit here? Would not every reviewing court therefore not only

have to consider all the many things it must consider at the present time in preparing an opinion and disposing of cases on review but also the possible future effects in other litigation of its opinion which might be entirely unintended by the court of review? The Seventh Circuit makes no comment about this difficulty. Clearly, the independence of the federal judiciary itself as it has been known throughout our constitutional history is seriously compromised by the decision of the Seventh Circuit herein.

The effects of the decision below will derange the proper balance in the delicate relationship between the state and federal judiciaries. The Seventh Circuit's Opinion is inconsistent with the principles of comity between the two judicial systems discussed in *Younger* v. *Harris*, 401 U.S. 37, 43-46, 50-56, 91 S.Ct. 746, 750-751, 753-755 (1971) and is unsupported by this Court's decision in *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972) where it is far from clear the Court was dealing with a criminal prosecution at all and in any event was not dealing with the criminal prosecution of the type allegedly threatened by Respondents in this cause. As noted above, *Mitchum* involved a true prohibitory injunction which precluded the state judge from acting at all and not one, as here, where the federal district court supervised the state judge's acts, as he performed them. This Court has repeatedly emphasized the importance of maintaining the delicate balance between the two judiciaries so as not to impair the independence or effectiveness of the state judiciary and even where the paramount federal power has been recognized, this Court has been at pains to recognize the special circumstances present which justify intervention which is always regarded as an extraordinary procedure. *Mitchum* v. *Foster*, *supra*. By contrast, the Seventh Cir-

cuit's approach seems to be that because there is no exact precedent *for bidding* the specific type of action brought by respondents, the action should be allowed.

The Court of Appeals obviously was impressed by the state of administration of criminal justice in Illinois at the present time as it referred, with apparent disapproval, to the standard of proof of sentence in criminal matters delineated in *People* v. *Bonner*, 37 Ill.2d 553, 563 (1967) cert. den. 392 U.S. 910, 88 S.Ct. 2067 (1968). That standard is that "Imposition of sentence is a matter of judicial discretion, and in the absence of a manifest abuse of that discretion it will not be altered by a reviewing court." Far from being an infringement of constitutional rights, this is a clear statement of an enlightened system of individualized justice which attempts to fit the sentence to the offender rather than to the crime. The Court of Appeals apparently was impressed with its belief that in Illinois ". . . the individual defendant in a criminal case finds it extremely difficult, if not impossible, to obtain review of his sentence as long as it is within the statutory limits." 468 F.2d at 408. As noted in Halperin, "Appellate review of sentence in Illinois—reality or illusion?" 55 Ill. Bar. J. 300 (Dec., 1966) the power of intermediate appellate courts in Illinois to alter and modify criminal sentences on appeal has been applied "most rationally and perceptively" by the Fifth District Appellate Court of Illinois, the Appellate Court that hears criminal appeals from Alexander County, Illinois. Chapter 37 ¶ 5, Illinois Revised Statutes (1971). But putting aside such enlightened and progressive statutory patterns and administration by appellate courts, this Court has held that federal courts should refuse to intervene in state criminal proceedings even to suppress the use of evidence unlawfully seized

until state remedies are exhausted, *Stefanelli* v. *Minard*, 342 U.S. 117, 124ff, 72 S.Ct. 118, 122ff (1951).

Every criminal defendant in Illinois has the right to change of venue or substitution of judge, Chapter 38:114-5, 114-6, Illinois Revised Statutes (1971), and may apply either to the Chief Judge of the particular circuit in which trial is to be had for assignment of a different judge or to the Supreme Court of Illinois and its Administrator for reassignment or substitution of a judge. Illinois Constitution of 1970, Article VI, sec. 7(c). Further, in addition to the ordinary procedures of trial and appeal, Illinois has a post-conviction review act providing a convicted criminal defendant who has exhausted his rights of initial appeal with a forum for consideration of any contention he makes that he has sustained a substantial denial of his rights under the Constitution of either the United States or of the State of Illinois or both, Chapter 38:122-1 et seq., Illinois Revised Statutes (1971).

It should be noted also that if an Illinois state judge persists in willful conduct in office or other conduct that is prejudicial to the administration of justice or brings the judicial office into disrepute, fully adequate disciplinary procedures exist which provide for suspension and removal where appropriate, Illinois Constitution of 1970, Article VI, sec. 15(e).

Beyond this comprehensive state procedural scheme which in fact does fully protect and take cognizance of all complaints, constitutional and nonconstitutional, in the field of criminal law, lies the federal judiciary with its remedies of habeas corpus. As this Court noted in *City of Greenwood Mississippi* v. *Peacock*, 384 U.S. 808, 829, 86 S.Ct. 1800, 1813 (1966):

> "But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. . . . If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. . . . If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. . . . If their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. . . ."

What the Seventh Circuit and the respondents seem to contend is that not only is the Illinois State system with its full rights of appeal, change of venue, post conviction review, etc. incompetent to protect the rights of the persons Respondents allege will be aggrieved in the future but the federal judiciary also with all its remedies and particularly habeas corpus is likewise incompetent to deal with the future claims of allegedly aggrieved criminal defendants. To state this is to refute the position of the Seventh Circuit and the Respondents and it is noteworthy that neither that Court nor the Respondents have formulated the claims made in just that way even though that is precisely what is involved. For the present action to be sustained there must be a finding that the injuries are immediate and irreparable to Respondents and those they represent and that there is no other adequate remedy. As is shown summarily herein and in much more detail in

briefs filed on behalf of the Petitioners herein, remedies abound in both the state and federal system.

Another unanswered question created by the opinion of the Seventh Circuit is whether the supervision contemplated by that Court to be carried out by the local federal district judge over the Petitioners is to directly affect the rights of a criminal defendant before one or both of the Petitioners. Whichever way the question is answered, insurmountable problems are immediately apparent.

If supervision by the district judge is to directly affect the status of the criminal defendant and supersede the acts of the state judge, what effect does this have on subsequent proceedings on review or otherwise in other state courts of Illinois or, for that matter, subsequently in the federal judiciary on writ of habeas corpus or some other proceeding? Is the supervisory act of the federal district judge beyond review? It should not be assumed that every supervisory act of the federal district judge will be favorable to the aggrieved criminal defendant. If the supervisory act is unfavorable to a contention or a position of the aggrieved criminal defendant, what right of review does he have? Further, is the supervisory act of the federal district judge to be subject in any way to alteration or amendment by the courts of review in the State of Illinois? If so, is the right of review there exclusive and does a criminal defendant seeking review in the state system preclude review in the federal judiciary of a supervisory act of a federal district judge thought by the criminal defendant to be discriminatory or, for that matter, erroneous. The Brief of Petitioners in Number 72-955, at pp. 36-37, demonstrates many other such analogous problems and, as noted there, the list is not exhaustive.

On the other hand, if the act of supervision by the federal district judge is not to affect the rights of the criminal defendant then what other purpose can the procedure sanctioned by the Seventh Circuit have than simple harassment of state judges. If the only effect of the supervisory order to be entered by the federal district judge is avoidance or receipt of a contempt citation and penalty therefor operating against the state judge only, then the criminal defendant certainly is not affected one way or the other by this most cumbersome and unfortunate procedure sanctioned by the Seventh Circuit. Of course there is no justification for either simple harassment of state judges or supervision at their judicial acts as they are performed.

Not only does the procedure sanctioned by the Seventh Circuit add nothing to the existing rights of criminal defendants but existing rights would be impaired by such a procedure. This is because the state judge, operating under supervision which might lead to contempt on his part must not only look at the individual case before him in which a minority person may be charged and convicted with a crime in which he must render sentence but must apparently take into consideration all other cases before him and somehow work out an acceptable pattern in sentencing that can be established and proven in a court of equity. This has several unfortunate effects. First, the state judge is necessarily going to consider not only every other case he has had and the wisdom that may have accrued as a result of that experience but he must somehow harmonize the case before him with all past cases so that an acceptable pattern on a ratio basis is manifest. Secondly, even if the balance and pattern sought by the supervising federal judge is achieved, constitutional rights of

the defendants before the state judge may be infringed and justice in a nonconstitutional sense also may be impaired. This is because a criterion based solely upon race may be seriously misleading. This analysis is developed in detail in the Brief of the District Attorney of the County of Los Angeles, State of California as amicus curiae, pp. 12 and Appendix A. Furthermore, a state judge considering a nonminority criminal defendant would necessarily tailor the sentence administered in that nonminority individual's case so that it would comprise an acceptable part of the pattern vis-a-vis minority criminal defendants' sentences which would thus deny the nonminority criminal defendant his individual right to due process and equal protection of the laws. Thus not only is protection of existing rights of criminal defendants not enhanced by the decision below but existing rights of all criminal defendants are jeopardized.

C.

The Decision Below Erroneously Authorizes Suits Having Grave Effects On The Administration Of Justice Based On Conclusory, Non-Specific Allegations Only Of The State Of Mind of Defendant Judges Rather Than Conduct Of Such Defendants.

Given the enormous consequences of implementation of the Seventh Circuit's opinion, the very least that should have been required by that Court was some specificity about present conditions and acts of the Petitioners. As this Court noted in *Boyle* v. *Landry,* 401 U.S. 77, 80-81, 91 S.Ct. 758, 760 (1971):

> "It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the

intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. Rather, it appears from the allegations that those who originally brought this suit made a search of state statutes and city ordinances with a view to picking out certain ones that they thought might possibly be used by the authorities as devices for bad-faith prosecutions against them. There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy or of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner . . . . the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here."

How much more compelling the language is when the attack is made not merely upon state law enforcement activities but upon the very judicial function itself.

D.

The Decision Below Would Effectively Cripple The Administration Of Criminal Justice By Both The State And Federal Judiciaries.

As noted above, the holding of the Seventh Circuit would expose federal judges, at least to a limited extent, to supervision of the type sanctioned by the Seventh Circuit for Illinois state judges. (The problem of discrimination can be as acute, if not more so, in the federal judiciary as in the state judiciary, see Griswold, *Law and lawyers in the United States: the common law under stress,* pp. 145-146 (Cambridge, 1965).) The effects of the Seventh Circuit's decision, however, would be so administratively overwhelming upon both the state and federal judiciaries as to make all administration of criminal law virtually unworkable.

In both state and federal systems, backlog in trial and appellate courts is a most serious problem. While Illinois had made and continues to make valiant efforts in combating the problem both at the trial and appellate levels through activities of this amicus and the Judicial Conference of Illinois established by the Supreme Court of that State and the Supreme Court's Administrative Office, the progress achieved is won at the cost of great effort and could easily be frustrated by any sudden and unremitting increase of new cases. It is clear that not only would Illinois state trial judges be subject to supervision by the local federal district judge under the decision below but any other member of the state judiciary including the intermediate appellate court and the state supreme court itself would be also. Thus, not only would the confusion reign over the trial courts in Illinois but throughout the entire judicial system.

This Court needs no documentation of the serious problems existing today in the district and appeals courts of the United States in terms of dockets. It is ironic that at such a time the Seventh Circuit, one of the most seriously burdened of all federal circuits, has initiated a procedure which would completely engulf the federal system and yet not protect to any greater extent than present procedures rights of criminal defendants.

The argument made on this point is not merely that the courts would be burdened to a somewhat greater extent than they are today by a new type of case. The argument is that the clear implications of the Seventh Circuit's holding indicate an immediate increase of case loads to such an extent that the very capacity of the federal and Illinois judicial systems to cope with criminal cases would be seriously impaired and possibly eliminated. In all of the briefs and materials presented to this Court in this matter reference is made repeatedly to fundamental propositions but surely there is nothing more fundamental that court systems that are paralyzed can give no relief to anybody.

V.

CONCLUSION

Because of the above stated reasoning and authorities, this Court should reverse the judgment herein of the United States Court of Appeals for the Seventh Circuit and affirm the judgment of the United States District Court for the Eastern District of Illinois dismissing with prejudice in final bar of action the Respondents' Amended Complaint as to Petitioners herein.

Respectfully submitted,

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O'SHEA, MAGISTRATE, CIRCUIT COURT OF ALEXANDER COUNTY, ILLINOIS, ET AL. *v.* LITTLETON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-953. Argued October 17, 1973—Decided January 15, 1974

Respondents, 17 black and two white residents of Cairo, Illinois, brought a civil rights class action against petitioners, a magistrate and a circuit court judge, who allegedly engaged under color of state law, in a continuing pattern and practice of conduct consisting of illegal bond-setting, sentencing, and jury-fee practices in criminal cases, which assertedly deprived respondents and members of their class of their rights under the Constitution and 42 U. S. C. §§ 1981–1983, 1985. The District Court dismissed the action for want of jurisdiction to issue the injunctive relief sought and on the ground of judicial immunity. The Court of Appeals reversed, holding that issuance of injunctions against judicial officers was not forbidden if their conduct was intentionally racially discriminatory against a cognizable class of persons. Absent sufficient remedy at law, it was held that if respondents proved their allegations, the District Court should fashion appropriate relief to enjoin petitioners from depriving others of their constitutional rights while carrying out their judicial duties in the future. *Held:*

1. The complaint fails to satisfy the threshold requirement of Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy, where none of the named plaintiffs is identified as himself having suffered any injury in the manner specified, the claim alleging injury is in only the most general terms, and there are no allegations that any relevant state criminal statute is unconstitutional on its face or as applied or that plaintiffs have been or will be improperly charged with violating criminal law. Pp. 493–499.

(a) If none of the named plaintiffs purporting to represent a class meets the case-or-controversy requirement, none may seek relief on behalf of himself or any other member of the class. Pp. 494–495.

(b) That requirement is not satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. P. 497.

(c) Where it can only be speculated whether respondents will be arrested for violating an ordinance or state statute, particularly in the absence of allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct, and respondents have not pointed to any imminent prosecutions contemplated against them so that they do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court. Pp. 497–498.

2. Even if the complaint were considered to present an existing case or controversy, no adequate basis for equitable relief has been stated. Pp. 499–504.

(a) The injunctive relief sought by respondents would constitute a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings, and would sharply conflict with recognized principles of equitable restraint, *Younger* v. *Harris*, 401 U. S. 37. Pp. 499–502.

(b) Respondents also failed to establish the basic requisites of the issuance of equitable relief—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law—in view of the conjectural nature of the threatened injury to which respondents are allegedly subjected, and where there are available other procedures, both state and federal, which could provide relief. Pp. 502–504.

468 F. 2d 389, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment and in Part I of the Court's opinion, *post*, p. 504. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 505.

Robert J. O'Rourke, Deputy Assistant Attorney General of Illinois, argued the cause for petitioners. With

him on the briefs were *William J. Scott*, Attorney General, *Fred F. Herzog*, First Assistant Attorney General, *John W. Freels*, Special Assistant Attorney General, and *Jerrald B. Abrams*, Assistant Attorney General.

Alan M. Wiseman argued the cause for respondents. With him on the brief were *James B. O'Shaughnessy* and *Michael P. Seng*.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The respondents are 19 named individuals who commenced this civil rights action, individually and on behalf of a class of citizens of the city of Cairo, Illinois, against the State's Attorney for Alexander County, Illinois, his investigator, the Police Commissioner of Cairo, and the petitioners here, Michael O'Shea and Dorothy Spomer, Magistrate and Associate Judge of the Alexander County Circuit Court, respectively, alleging that they have intentionally engaged in, and are continuing to engage in, various patterns and practices of conduct in the administration of the criminal justice system in Alexander County that deprive respondents of rights secured by the First, Sixth, Eighth, Thirteenth, and Fourteenth Amendments, and by 42 U. S. C. §§ 1981, 1982, 1983, and 1985. The complaint, as amended, alleges that since the early 1960's, black citizens of Cairo, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien*, Assistant Attorneys General, and *Robert R. Granucci*, Deputy Attorney General, for the State of California; and by *Jack E. Horsley* and *Richard F. Record, Jr.*, for the Illinois State Bar Assn.

in governmental decisionmaking and in ordinary day-to-day relations with white citizens and officials of Cairo, and have, as an important part of their protest, participated in, and encouraged others to participate in, an economic boycott of city merchants who respondents consider have engaged in racial discrimination. Allegedly, there had resulted a great deal of tension and antagonism among the white citizens and officials of Cairo.

The individual respondents are 17 black and two white residents of Cairo. The class, or classes, which they purport to represent are alleged to include "all those who, on account of their race or creed and because of their exercise of First Amendment rights, have [been] in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County," as well as financially poor persons "who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases." The complaint charges the State's Attorney, his investigator, and the Police Commissioner with a pattern and practice of intentional racial discrimination in the performance of their duties, by which the state criminal laws and procedures are deliberately applied more harshly to black residents of Cairo and inadequately applied to white persons who victimize blacks, to deter respondents from engaging in their lawful attempt to achieve equality. Specific supporting examples of such conduct involving some of the individual respondents are detailed in the complaint as to the State's Attorney and his investigator.

With respect to the petitioners, the county magistrate and judge, a continuing pattern and practice of conduct, under color of law, is alleged to have denied and to continue to deny the constitutional rights of respondents and members of their class in three respects:

(1) petitioners set bond in criminal cases according to an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant in violation of the Eighth and Fourteenth Amendments; (2) "on information and belief" they set sentences higher and impose harsher conditions for respondents and members of their class than for white persons, and (3) they require respondents and members of their class when charged with violations of city ordinances which carry fines and possible jail penalties if the fine cannot be paid, to pay for a trial by jury in violation of the Sixth, Eighth, and Fourteenth Amendments. Each of these continuing practices is alleged to have been carried out intentionally to deprive respondents and their class of the protections of the county criminal justice system and to deter them from engaging in their boycott and similar activities. The complaint further alleges that there is no adequate remedy at law and requests that the practices be enjoined. No damages were sought against the petitioners in this case, nor were any specific instances involving the individually named respondents set forth in the claim against these judicial officers.

The District Court dismissed the case for want of jurisdiction to issue the injunctive relief prayed for and on the ground that petitioners were immune from suit with respect to acts done in the course of their judicial duties. The Court of Appeals reversed, holding that *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), on which the District Court relied, did not forbid the issuance of injunctions against judicial officers if it is alleged and proved that they have knowingly engaged in conduct intended to discriminate against a cognizable class of persons on the basis of race. Absent sufficient remedy at law, the Court of Appeals ruled that in the event respondents proved their allegations, the District Court should proceed to fashion appropriate injunctive relief

to prevent petitioners from depriving others of their constitutional rights in the course of carrying out their judicial duties in the future.[1] We granted certiorari. 411 U. S. 915 (1973).

I

We reverse the judgment of the Court of Appeals. The complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. *Flast* v. *Cohen*, 392 U. S. 83, 94–101 (1968); *Jenkins* v. *McKeithen*, 395 U. S. 411, 421–425 (1969) (opinion of MARSHALL, J.). Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).[2] There

[1] While the Court of Appeals did not attempt to specify exactly what type of injunctive relief might be justified, it at least suggested that it might include a requirement of "periodic reports of various types of aggregate data on actions on bail and sentencing." 468 F. 2d, at 415. The dissenting judge urged that a federal district court has no power to supervise and regulate by mandatory injunction the discretion which state court judges may exercise within the limits of the powers vested in them by law, and that any relief contemplated by the majority holding which might be applicable to the pattern and practice alleged, if proven, would subject the petitioners to the continuing supervision of the District Court, the necessity of defending their motivations in each instance when the fixing of bail or sentence was challenged by a Negro defendant as inconsistent with the equitable relief granted, and the possibility of a contempt citation for failure to comply with the relief awarded. *Id.*, at 415–417.

[2] We have previously noted that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, *e. g.*, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 212 (1972) (WHITE, J., concurring); *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 6 (1968)." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617

must be a "personal stake in the outcome" such as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf. *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Golden* v. *Zwickler*, 394 U. S. 103, 109–110 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–91 (1947). Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.[3] *Bailey* v. *Patterson*, 369 U. S. 31, 32–33

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n. 3 (1973). But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur. Title 42 U. S. C, § 1983, in particular, provides for liability to the "party injured" in an action at law, suit in equity, or other proper proceeding for redress. Perforce, the constitutional requirement of an actual case or controversy remains. Respondents still must show actual or threatened injury of some kind to establish standing in the constitutional sense.

[3] There was no class determination in this case as the complaint was dismissed on grounds which did not require that determination to be made. Petitioners assert that the lack of standing of the named respondents to raise the class claim is buttressed by the incongruous nature of the class respondents seek to represent. The class is variously and incompatibly defined in the complaint as those residents of Cairo, both Negro and white, who have boycotted

(1962); *Indiana Employment Division* v. *Burney*, 409 U. S. 540 (1973). See 3B J. Moore, Federal Practice, ¶ 23.10–1, n. 8 (2d ed. 1971).

In the complaint that began this action, the sole allegations of injury are that petitioners "have engaged in and continue to engage in, a pattern and practice of conduct . . . all of which has deprived and continues to deprive plaintiffs and members of their class of their" constitutional rights and, again, that petitioners "have denied and continue to deny to plaintiffs and members of their class their constitutional rights" by illegal bond-setting, sentencing, and jury-fee practices. None of the named plaintiffs is identified as himself having suffered any injury in the manner specified. In sharp contrast to the claim for relief against the State's Attorney where specific instances of misconduct with respect to particular individuals are alleged, the claim against petitioners alleges injury in only the most general terms. At oral argument, respondents' counsel stated that some of the named plaintiffs-respondents, who could be identified by name if necessary, had actually been defendants in proceedings before petitioners and had suffered from the alleged unconstitutional practices.[4] Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if

certain businesses in that city and engaged in similar activities for the purpose of combatting racial discrimination, as a class of all Negro citizens suffering racial discrimination in the application of the criminal justice system in Alexander County (though two white persons are named respondents), and as all poor persons unable to afford bail, counsel, or jury trials in city ordinance cases. The absence of specific claims of injury as a result of any of the wrongful practices charged, in light of the ambiguous and contradictory class definition proffered, bolsters our conclusion that these respondents cannot invoke federal jurisdiction to hear the claims they present in support of their request for injunctive relief.

[4] Tr. of Oral Arg. 21, 23, 26.

unaccompanied by any continuing, present adverse effects. Neither the complaint nor respondents' counsel suggested that any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before petitioners. Indeed, if any of the respondents were then serving an assertedly unlawful sentence, the complaint would inappropriately be seeking relief from or modification of current, existing custody. See *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973). Furthermore, if any were then on trial or awaiting trial in state proceedings, the complaint would be seeking injunctive relief that a federal court should not provide. *Younger* v. *Harris*, 401 U. S. 37 (1971); see also Part II, *infra*. We thus do not strain to read inappropriate meaning into the conclusory allegations of this complaint.

Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. But here the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners. Important to this assessment is the absence of allegations that any relevant criminal statute of the State of Illinois is unconstitutional on its face or as applied or that respondents have been or will be improperly charged with violating criminal law. If the statutes that might possibly be enforced against respondents are valid laws, and if charges under these statutes are not improvidently made or pressed, the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, will be affected by the

allegedly illegal conduct charged. Apparently, the proposition is that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture. See *Younger* v. *Harris, supra,* at 41–42. The nature of respondents' activities is not described in detail and no specific threats are alleged to have been made against them. Accepting that they are deeply involved in a program to eliminate racial discrimination in Cairo and that tensions are high, we are nonetheless unable to conclude that the case-or-controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.

As in *Golden* v. *Zwickler,* 394 U. S. 103 (1969), we doubt that there is " 'sufficient immediacy and reality' " to respondents' allegations of future injury to warrant invocation of the jurisdiction of the District Court. There, "it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint." *Id.,* at 109. Here we can only speculate whether respondents will be arrested, either again or for the first time, for violating a municipal ordinance or a state statute, particularly in the absence of any allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct. Cf. *Perez* v. *Ledesma,*

401 U. S. 82, 101–102 (1971) (opinion of BRENNAN, J.). Even though Zwickler attacked a specific statute under which he had previously been prosecuted, the threat of a new prosecution was not sufficiently imminent to satisfy the jurisdictional requirements of the federal courts. Similarly, respondents here have not pointed to any imminent prosecutions contemplated against any of their number and they naturally do not suggest that any one of them expects to violate valid criminal laws. Yet their vulnerability to the alleged threatened injury from which relief is sought is necessarily contingent upon the bringing of prosecutions against one or more of them. Under these circumstances, where respondents do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or indicate that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court.

In *Boyle* v. *Landry*, 401 U. S. 77, 81 (1971), the Court ordered a complaint dismissed for insufficiency of its allegations where there was no basis for inferring "that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner." The Court expressed the view that "the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Ibid.* A similar element of uncertainty about whether the alleged injury will be likely to occur is present in this case, and a similar reluctance to interfere with the normal operation of state administration of its criminal laws in the manner sought by respondents strengthens the conclusion

that the allegations in this complaint are too insubstantial to warrant federal adjudication of the merits of respondents' claim.

II

The foregoing considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief; and even if we were inclined to consider the complaint as presenting an existing case or controversy, we would firmly disagree with the Court of Appeals that an adequate basis for equitable relief against petitioners had been stated. The Court has recently reaffirmed the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger* v. *Harris*, 401 U. S. 37, 43–44 (1971). Additionally, recognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is " 'both great and immediate.' " *Id.*, at 46. See, *e.g.*, *Fenner* v. *Boykin*, 271 U. S. 240 (1926); *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943). In holding that 42 U. S. C. § 1983 is an Act of Congress that falls within the "expressly authorized" exception to the absolute bar against federal injunctions directed at state court proceedings provided by 28 U. S. C. § 2283, the Court expressly observed that it did not intend to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster*, 407 U. S. 225, 243 (1972). Those principles preclude equitable intervention in the circumstances present here.

Respondents do not seek to strike down a single state statute, either on its face or as applied; nor do they seek to enjoin any criminal prosecutions that might be brought under a challenged criminal law. In fact, respondents apparently contemplate that prosecutions will be brought under seemingly valid state laws. What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. The order the Court of Appeals thought should be available if respondents proved their allegations would be operative only where permissible state prosecutions are pending against one or more of the beneficiaries of the injunction. Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* v. *Harris*, *supra*, and related cases sought to prevent.

A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable. In concluding that injunctive relief would be available in this case because it would not interfere with prosecutions to be commenced under challenged statutes, the Court of Appeals misconceived the underlying basis for withholding federal equitable relief when the normal course of criminal proceedings in the state courts would otherwise be disrupted. The objection is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts; the object is to sustain "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Stefanelli* v. *Minard*, 342 U. S. 117,

120 (1951).[5] See also *Cleary* v. *Bolger*, 371 U. S. 392 (1963); *Wilson* v. *Schnettler*, 365 U. S. 381 (1961); *Pugach* v. *Dollinger*, 365 U. S. 458 (1961); cf. *Rea* v. *United States*, 350 U. S. 214 (1956). An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*. Moreover, it would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class.[6] The Court of Appeals disclaimed any intention of requiring the District Court to sit in constant day-to-day supervision of these judicial officers, but the "periodic reporting" system it thought might be warranted [7] would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity. Cf. *Greenwood* v. *Peacock*, 384 U. S. 808 (1966). Moreover, because an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations of compliance, the question arises of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed. Presumably, any member of respondents' class who appeared as an

[5] It was noted in *Stefanelli* that in suits brought under 42 U. S. C. § 1983 "we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages. Compare *Giles* v. *Harris*, 189 U. S. 475, with *Lane* v. *Wilson*, 307 U. S. 268." 342 U. S., at 122.

[6] See n. 3, *supra*.

[7] See n. 1, *supra*.

accused before petitioners could allege and have adjudicated a claim that petitioners were in contempt of the federal court's injunction order, with review of adverse decisions in the Court of Appeals and, perhaps, in this Court. Apart from the inherent difficulties in defining the proper standards against which such claims might be measured, and the significant problems of proving noncompliance in individual cases, such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted.

Respondents have failed, moreover, to establish the basic requisites of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. We have already canvassed the necessarily conjectural nature of the threatened injury to which respondents are allegedly subjected. And if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged. Open to a victim of the discriminatory practices asserted under state law are the right to a substitution of judge or a change of venue, Ill. Rev. Stat., c. 38, §§ 114–5, 114–6 (1971), review on direct appeal or on postconviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings, including the possibility of suspension or removal, are warranted. Ill. Const., Art. VI, § 15 (e). In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available.

Nor is it true that unless the injunction sought is available federal law will exercise no deterrent effect in these circumstances. Judges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights, as this complaint alleges, must take account of 18 U. S. C. § 242. See *Greenwood* v. *Peacock, supra,* at 830; *United States* v. *Price,* 383 U. S. 787, 793–794 (1966); *United States* v. *Guest,* 383 U. S. 745, 753–754 (1966); *Screws* v. *United States,* 325 U. S. 91, 101–106 (1945); *United States* v. *Classic,* 313 U. S. 299 (1941). Cf. *Monroe* v. *Pape,* 365 U. S. 167, 187 (1961). That section provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined . . . or imprisoned . . . ."

Whatever may be the case with respect to civil liability generally, see *Pierson* v. *Ray,* 386 U. S. 547 (1967), or civil liability for willful corruption, see *Alzua* v. *Johnson,* 231 U. S. 106, 110–111 (1913); *Bradley* v. *Fisher,* 13 Wall. 335, 347, 350, 354 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. *Ex parte Virginia,* 100 U. S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress . . . ." *Gravel* v. *United States,* 408 U. S. 606, 627 (1972).

Considering the availability of other avenues of relief open to respondents for the serious conduct they assert, and the abrasive and unmanageable intercession which the injunctive relief they seek would represent, we conclude that, apart from the absence of an existing case or controversy presented by respondents for adjudication, the Court of Appeals erred in deciding that the District Court should entertain respondents' claim.

Reversed.

MR. JUSTICE BLACKMUN, concurring in part.

I join the judgment of the Court and Part I of the Court's opinion which holds that the complaint "failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy." *Ante*, at 493.

When we arrive at that conclusion, it follows, it seems to me, that we are precluded from considering any other issue presented for review. Thus, the Court's additional discussion of the question whether a case for equitable relief was stated amounts to an advisory opinion that we are powerless to render. *Hayburn's Case*, 2 Dall. 409 (1792); *United States* v. *Evans*, 213 U. S. 297, 301 (1909); *Muskrat* v. *United States*, 219 U. S. 346, 360–361 (1911); *Stearns* v. *Wood*, 236 U. S. 75 (1915); *Coffman* v. *Breeze Corps.*, 323 U. S. 316 (1945); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947); *Paschall* v. *Christie-Stewart, Inc.*, *ante*, at 101–102.

Mr. Justice Frankfurter stated the applicable principle in speaking for the Court in *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U. S. 222, 223 (1954):

> "On this appeal, appellee contends that the District Court should not have reached the statutory and constitutional questions—that it should have

> dismissed the suit for want of a 'case or controversy,' for lack of standing on the union's part to bring this action, ... Since the first objection is conclusive, there is an end of the matter."

I would adhere to that principle. Either there is no case or controversy and that is the end of the matter, or there is a case or controversy and the Court may go on to a decision on the merits. In my view, the Court may not have it both ways.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The respondents in this case are black and indigent citizens of Cairo, Illinois. Suing in federal court, they alleged that since the early 1960's black citizens of Cairo have been actively seeking equal opportunity and treatment in employment, housing, education, and ordinary day-to-day relations with the white citizens and officials of Cairo. In this quest, blacks have engaged in a boycott of local merchants deemed to have engaged in racial discrimination.

Alleging that this quest for equality has generated substantial antagonism from white governmental officials, respondents brought a class action under 42 U. S. C. §§ 1981, 1982, 1983, and 1985, seeking to represent citizens of Cairo who have been subjected in the past, and continue to be subjected, to the allegedly discriminatory and unconstitutional administration of criminal justice in Alexander County, Illinois, which includes Cairo. Among their other claims, respondents alleged that petitioners Michael O'Shea and Dorothy Spomer, both now judges in Alexander County,[1] engage in acts which deprive them and

[1] O'Shea, Magistrate of Alexander County Circuit Court when this suit was instituted, became an Associate Judge in the county on July 1, 1971.

members of their class of their constitutional rights. These judges allegedly set bond in criminal cases without regard to the facts of individual cases and as punishment, and not merely to assure the appearance of defendants at trial; impose higher sentences and harsher conditions of sentencing on blacks than on white citizens; and require respondents and members of their class, when charged with violations of city ordinances which carry fines and possible jail penalties, to pay for a trial by jury if the fine cannot be paid.

I

An injunction was sought against this conduct. The District Court referred obliquely to want of jurisdiction, but, focusing on the fact that the complaint sought review of matters of judicial discretion, concluded that the action should be dismissed because judges and magistrates are immune from liability for acts done in performance of their duties. In reversing and remanding the case to the District Court, the Court of Appeals held that the action was not barred by the doctrine of judicial immunity. The Court of Appeals also held that the complaint contained sufficiently specific factual averments to satisfy Fed. Rule Civ. Proc. 8 (a). 468 F. 2d 389.

This Court now decides for the first time in the course of this litigation that the complaint is deficient because it does not state a "case or controversy" within the meaning of Art. III.

The fact that no party has raised that issue in this closely contested case is no barrier, of course, to our consideration of it. But the reasoning and result reached by the Court are to say the least a *tour de force* and quite inconsistent with the allegations in the complaint, which are within constitutional requirements.

We know from the record and oral argument that Cairo, Illinois, is boiling with racial conflicts. This class action brought under 42 U. S. C. §§ 1981, 1982, 1983, and 1985 is to remedy vast invasions of civil rights. The Court, however, says that it is not a "case or controversy" because none of the named plaintiffs has alleged infringement of his rights and the fact that other members of the class may have been injured is not enough. As to the latter, *Bailey* v. *Patterson*, 369 U. S. 31, 32–33, is cited in support. But in *Bailey* the named persons were given standing to sue, the statement that "[t]hey cannot represent a class of whom they are not a part," *id.*, at 32–33, being dictum and its only authority being *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162–163, which was not a class action. Nor was the question on which the case is made to turn resolved in *Indiana Employment Division* v. *Burney*, 409 U. S. 540. For we only held that where the named plaintiff had received relief and nothing appeared as to the relief, if any, granted to members of the class, the possible question of mootness should be resolved by the District Court. Even so, there were dissents. The upshot is that one crucial issue on which the Court makes this case turn has not been decided by the Court and was never argued here. At the very least we should have a full-dress reargument on that point.

But I do not press the point, for the amended complaint is sufficiently specific to warrant a trial.

As respects O'Shea, the Magistrate, and Spomer, the Circuit Judge, the charges concerning *named plaintiffs* are as follows:

(1) that excessive bonds have been required in violation of the Eighth and Fourteenth Amendments because petitioners follow an unofficial bond schedule without regard to the facts of individual cases;

(2) on information and belief, that petitioners set higher sentences and impose harsher conditions for respondents and members of their class than for white persons;

(3) that, where the named plaintiffs have been fined and at times sentenced to jail and cannot pay the fines, these judges have required them to pay for a trial by jury.

Moreover, the amended complaint alleges that O'Shea and Spomer "continue to engage in a pattern and practice" which "has deprived and continues to deprive" the named plaintiffs and members of their class of their constitutional rights. Moreover, it is alleged that since early in the 1960's the blacks of Cairo and some whites have been actively and peaceably seeking to end discrimination in Cairo and that those activities have generated and continue to generate tension and antagonism in Cairo.

It is also alleged that the police commissioner in Cairo "has denied and continues to deny to plaintiffs and members of their class their constitutional rights in the following ways:

> "(a) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.
>
> "(b) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the

> facts and is far more severe than like charges would be against a white person."

These allegations support the likelihood that the named plaintiffs as well as members of their class will be arrested in the future and therefore will be brought before O'Shea and Spomer and be subjected to the alleged discriminatory practices in the administration of justice.

These allegations of past and continuing wrongdoings clearly state a case or controversy in the Art. III sense. They are as specific as those alleged in *Jenkins* v. *McKeithen*, 395 U. S. 411, and in *Doe* v. *Bolton*, 410 U. S. 179, where we held that cases or controversies were presented.

Specificity of proof may not be forthcoming; but specificity of charges is clear.

What has been alleged here is not only wrongs done to named plaintiffs, but a recurring pattern of wrongs which establishes, if proved, that the legal regime under control of the whites in Cairo, Illinois, is used over and over again to keep the blacks from exercising First Amendment rights, to discriminate against them, to keep from the blacks the protection of the law in their lawful activities, to weight the scales of justice repeatedly on the side of white prejudices and against black protests, fears, and suffering. This is a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen. It may not survive a trial. But if this case does not present a "case or controversy" involving the named plaintiffs, then that concept has been so watered down as to be no longer recognizable. This will please the white superstructure, but it does violence to the conception of evenhanded justice envisioned by the Constitution.

Suits under 42 U. S. C. § 1983 are exceptions to the absolute bar against federal injunctions directed at state

court proceedings provided in 28 U. S. C. § 2283.[2] See *Mitchum* v. *Foster*, 407 U. S. 225. It will be much more appropriate to pass on the nature of any equitable relief to be granted after the case has been tried. It may be that when the case is ended, no injunction against any state proceeding will be asked for or will seem appropriate. Or the injunctive relief in final analysis may come down to very narrow and discrete orders prohibiting precise practices. The Court labels this an "ongoing federal audit of state criminal proceedings." That of course is a regime that we do not foster. But the Federal Constitution is supreme and if the power of the white power-structure in Cairo, Illinois, is so great as to disregard it, extraordinary relief is demanded. I would cross the bridge of remedies only when the precise contours of the problem have been established after a trial.

To repeat, in the instant case, there are allegations that state lower-court judges are willfully discriminating in their sentencing determinations and are imposing excessive bail. The effects of such results may well persist quite aside from the disposition of the underlying substantive charges at trial or on appeal, and may well be functionally unreviewable. The Court of Appeals observed that the individual defendant in a criminal case will find it difficult, if not impossible, to obtain review of a sentence within statutory limits unless it is manifestly harsh or unjustified, citing the Illinois rule that "imposition of sentence is a matter of judicial discretion, and in the absence of a manifest abuse of that discretion it will not be altered

[2] Title 28 U. S. C. § 2283 provides that:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

by a reviewing court." *People* v. *Bonner*, 37 Ill. 2d 553, 563, 229 N. E. 2d 527, 533 (1967), cert. denied, 392 U. S. 910 (1968).

Furthermore, the respondents do not primarily allege individual instances of excessively harsh treatment, on an absolute scale, of black and indigent defendants, but rather a pattern of discriminatory treatment, especially in favor of prosperous white defendants. Such allegations would amount to denials of equal protection even if blacks and poor whites were not subject to sentences which were so excessive that they constituted manifest abuses of discretion, as long as wealthy whites were at the same time receiving relatively lenient sentences from the same judges. A single instance of sentencing by itself might not strike the conscience of a reviewing court, but when coupled with a pattern of discriminatory treatment could well justify the equitable intervention of a federal court. A class suit where evidence could be developed showing a pattern of discriminatory bail and sentencing decisions by the petitioners would be the one appropriate vehicle in which these claims could be developed.

Whether respondents could come forward with such evidence, and whether the Federal District Court in the exercise of its equitable discretion could frame suitable relief are, of course, questions which can be answered only after a trial on the merits. The resolution of those issues would then be properly reviewable. But the principles of abstention and comity should not bar this suit *ab initio*.

II

Because I believe that the complaint is sufficient to state an actual "case or controversy," I reach the further question, on the merits, whether equitable relief may be warranted in the circumstances of this case. I agree, nonetheless, with my Brother BLACKMUN that the

Court's discussion in Part II of its opinion, whether a case for equitable relief was stated, is an advisory opinion since the Court has determined that there is no "case or controversy" in the Article III sense.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

There are seven statutes in addition to 42 U. S. C. § 1983 which the Court has recognized constitute "express exceptions" to the policy of nonintervention in state proceedings enunciated by the anti-injunction statute: (1) The Bankruptcy Act, 11 U. S. C. § 1 *et seq.*, specifically recognized by Congress as an exception to 28 U. S. C. § 2283. See *Mitchum* v. *Foster*, 407 U. S. 225, 233. (2) The Interpleader Act of 1936, 28 U. S. C. § 2361, allowing federal courts to restrain prosecution of state court suits involving property involved in federal interpleader actions. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74. (3) The 1851 Act limiting the liability of shipowners by providing for the cessation of proceedings against them when they have made a deposit equal to the value of their ships with a federal court, 46 U. S. C. § 185. See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599–600. (4) The Frazier-Lemke Farm Mortgage Act, 11 U. S. C. § 203 (s)(2). See *Kalb* v. *Feuerstein*, 308 U. S. 433. (5) The Federal Habeas Corpus Act, 28 U. S. C. § 2251, permitting a stay of state court proceedings when a federal habeas action is pending. See *Ex Parte Royall*, 117 U. S. 241, 248–249. (6) Section 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 33. See *Porter* v. *Dicken*, 328 U. S. 252, 255. (7) Legislation providing for the removal of litigation to federal courts and the simultaneous cessation of state court proceedings, 28 U. S. C. § 1446 (e). See *French* v. *Hay*, 22 Wall. 250.

This Court has also recognized the power of a federal court to stay proceedings in a state court to prevent relitigation of an issue already decided in a federal proceeding. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112. It has recognized the power of a federal court to enjoin state court proceedings to protect the jurisdiction which a federal court has already acquired over a *res*. See *Kline* v. *Burke Construction Co.*, 260 U. S. 226; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 135–136. And we have found it proper for a federal court to directly enjoin state proceedings when the injunction was sought by either the United States, *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, or by a federal agency asserting superior federal interests, see *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138.

SPOMER, STATE'S ATTORNEY OF ALEXANDER COUNTY, ILLINOIS *v.* LITTLETON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-955. Argued October 17, 1973—Decided January 15, 1974

Respondents, 17 black and two white residents of Cairo, Illinois, brought a civil rights class action against the then State's Attorney of Alexander County, Illinois, individually and in his official capacity, charging him with certain purposeful racial discrimination practices, under color of state law, in violation of the Constitution and 42 U. S. C. §§ 1981–1983, 1985. The District Court dismissed the complaint for want of jurisdiction to grant injunctive relief. The Court of Appeals reversed, holding that a prosecutor's quasi-judicial immunity from injunctive proscription was not absolute, and that since respondents' remedies at law were inadequate, an injunctive remedy might be available if respondents could prove their claims. Subsequent to the Court of Appeals' decision, petitioner was elected as successor State's Attorney, and in the petition for certiorari filed with this Court was substituted as a party. *Held:* Where, on the record, respondents have never charged petitioner with anything and do not presently seek to enjoin him from doing anything, so that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro*, the case is vacated and remanded to the Court of Appeals for a determination, in the first instance, of whether the former dispute is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief against petitioner. Pp. 520–523.

468 F. 2d 389, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

James B. Zagel argued the cause for petitioner. With him on the brief was *Patrick F. Healy*.

Alan M. Wiseman argued the cause for respond-

ents. With him on the brief were *James B. O'Shaughnessy* and *Michael P. Seng.**

MR. JUSTICE WHITE delivered the opinion of the Court.

This is a companion case to *O'Shea* v. *Littleton*, *ante*, p. 488, involving claims which the respondents, 17 black and two white residents of Cairo, Illinois, individually and as representatives of the class they purport to represent, set forth in that portion of their amended civil rights complaint which alleged wrongful conduct on the part of Peyton Berbling, individually and in his capacity as State's Attorney for Alexander County, Illinois, the county in which the city of Cairo is located. As discussed in *O'Shea*, the complaint alleged a broad range of racially discriminatory patterns and practices in the administration of the criminal justice system in Alexander County by the Police Commissioner of Cairo, Magistrate Michael O'Shea and Associate Judge Dorothy Spomer of the Alexander County Circuit Court, State's Attorney Berbling, and Earl Shepherd, an investigator for Berbling. Allegedly, a decade of active, but lawful, efforts to achieve racial equality for the black residents of Cairo had resulted in continuing intentional conduct on the part of those named as defendants in the complaint to deprive the plaintiff-respondents of the even-handed protection of the criminal laws, in violation of various amendments to the Constitution and 42 U. S. C. §§ 1981, 1982, 1983, and 1985.

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien*, Assistant Attorneys General, and *Robert R. Granucci*, Deputy Attorney General, for the State of California; and by *Joseph P. Busch* for the District Attorney of Los Angeles County.

In particular, the complaint charged State's Attorney Berbling with purposeful racial discrimination, under color of state law, by neglecting to provide for respondents' safety though knowing of the possibility of racial disorders, by refusing to prosecute persons who threaten respondents' safety and property, and by refusing to permit respondents to give evidence against white persons who threaten them. It was alleged, with particular incidents recounted as to some charges, that "Berbling has denied and continues to deny" the constitutional rights of respondents and members of their class by following the practices of (a) refusing to initiate criminal proceedings and to hear criminal charges against white persons upon complaint by members of respondents' class,[1]

[1] Specific examples of Berbling's practice were alleged as follows:

"(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

"(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to intimidate his family in order to prevent James Wilson from holding property.

"(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

"(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

"(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

"(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel

(b) submitting misdemeanor complaints which have been filed by black persons against whites to a grand jury, rather than proceeding by information or complaint, and then either interrogating witnesses and complainants before the grand jury with purposeful intent to racially discriminate,[2] or failing to interrogate them at all,[3] (c) in-

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James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

"(7) In May, 1969, Plaintiff Ewing and eight others could have [brought] and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures."

[2] Cited in support of this allegation was an incident when "Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than question him regarding the incident, asked him such questions as 'did you get paid for picketing?' A no-true bill was returned by the grand jury."

[3] Two episodes of this type were described:

"(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers arrived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

"(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discriminatory practices of merchants and public officials of the City of Cairo.

adequately prosecuting the few criminal proceedings instituted against whites at respondents' behest in order to lose the cases or settle them on terms more favorable than those brought against blacks, (d) recommending substantially greater bonds and sentences in cases involving respondents and members of their class than for cases involving whites, (e) charging respondents and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person, and (f) depriving respondents of their right to give evidence concerning the security of members of their class.[4] Each of these practices was alleged to be willful, malicious, and carried out with intent to deprive respondents and members of their class of the benefits of the county criminal justice system and to deter them from peacefully boycotting or otherwise engaging in protected First Amendment activity. Since there was asserted to be no adequate remedy at law, respondents requested that Berbling be enjoined from continuing these practices, that he be required to "submit a monthly report to [the District Court] concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class," and that the District Court maintain continuing jurisdiction in this action.[5]

A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident."

[4] Thus, respondents alleged that Berbling sought the "dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which [Berbling] would drop pending criminal charges against several of the [respondents]."

[5] Damages were also sought against Berbling for these practices and for an alleged conspiracy with his investigator, Shepherd, to

The District Court dismissed that portion of the complaint requesting injunctive relief against Berbling, as well as against Investigator Shepherd, Magistrate O'Shea, and Judge Dorothy Spomer, for want of jurisdiction to grant any such remedy, which was perceived as directed against discretionary acts on the part of these elected state officials. The Court of Appeals reversed, holding that whatever quasi-judicial immunity from injunctive proscription it had previously recognized was appropriate for a prosecutor, was not absolute, and since respondents' alternative remedies at law were thought to be inadequate, an injunctive remedy might be available if respondents could prove their claims of racial discrimination at trial.[6]

The Court of Appeals rendered its decision on October 6, 1972. At the subsequent election in November

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refuse to prosecute those who threatened respondents' safety and to prevent them from giving evidence against whites concerning acts threatening their personal safety. As to the latter, the sixth example in n. 1, *supra*, was reiterated. The Court of Appeals held that "insofar as defendant Berbling was acting within his prosecutorial function he has a quasi-judicial immunity from suit for damages under the Civil Rights Acts," 468 F. 2d 389, 410, and remanded to allow respondents to amend the complaint and to have the District Court determine in the first instance whether some of the acts then alleged would be sufficiently removed from quasi-judicial activity "to warrant removing the cloak of immunity from them." *Id.*, at 410–411. Berbling's petition for certiorari questioning this aspect of the Court of Appeals' ruling was not timely filed in this Court and has been denied. No. 72–1107, *post*, p. 1143. No question concerning damage relief is involved in the case presently before us.

[6] The scope of any injunction which might be found warranted was not finally established or restricted. It was suggested that an initial decree might require "only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints," and confidence was expressed that the District Court would be able to establish further guides as required and, if necessary, to consider individual decisions. 468 F. 2d, at 415.

of that year, petitioner W. C. Spomer [7] was chosen by the voters to succeed Berbling as State's Attorney for Alexander County, and Spomer took office on December 4. In the petition for certiorari filed with this Court on January 3, 1973, seeking review of the Court of Appeals' approval of the possibility of some form of injunctive relief addressed to the State's Attorney in the course of his prosecutorial role, petitioner Spomer relied upon Supreme Court Rule 48 (3), which provides that "[w]hen a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party." Respondents did not oppose the substitution,[8] and we granted certiorari and set the case for argument together with *O'Shea* v. *Littleton*, *ante*, p. 488. 411 U. S. 915 (1973).

It has become apparent, however, that there is nothing in the record upon which we may firmly base a conclusion that a concrete controversy between W. C. Spomer and the respondents is presented to this Court for resolution. No allegations in the complaint cited any conduct of W. C. Spomer as the basis for equitable or any other relief. Indeed, Spomer is not named as a

[7] State's Attorney W. C. Spomer should not be confused with Judge Dorothy Spomer, a petitioner in *O'Shea* v. *Littleton*, *ante*, p. 488.

[8] In their brief in opposition to the petition, p. 6, respondents stated that they "seek only equitable relief against petitioner W. C. Spomer. Because the amended complaint asks relief against Berbling in his individual as well as his official capacity, he remains a party in interest in this action." Of course, Spomer, not Berbling, filed for review of the Court of Appeals' decision respecting injunctive relief, and Berbling is not before the Court in this case. Nor did respondents ever seek relief of any kind against Spomer by their complaint.

defendant in the complaint at all, and, of course, he never appeared before either the District Court or the Court of Appeals. The injunctive relief requested against former State's Attorney Berbling, moreover, is based upon an alleged practice of willful and malicious racial discrimination evidenced by enumerated instances in which Berbling favored white persons and disfavored Negroes. The wrongful conduct charged in the complaint is personal to Berbling, despite the fact that he was also sued in his then capacity as State's Attorney.[9] No charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged, apart from the allegation that Berbling, as the incumbent at the time, was then continuing the practices he had previously followed. Cf. *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, 444–445 (1938). Nor have respondents ever attempted to substitute Spomer for Berbling after the Court of Appeals decision, so far as the record shows, or made any record allegations that Spomer intends to continue the asserted practices of Berbling of

[9] Supreme Court Rule 48 (3), governing automatic substitution of successor public officers when the predecessor was a party "in his official capacity," is based upon Fed. Rule Civ. Proc. 25 (d), as amended in 1961. Prior to the 1961 amendment, substitution was not automatic. The history and application of former and present Rule 25 (d) are sketched in 3B J. Moore, Federal Practice ¶ 25.09 [1]–[3] (2d ed. 1969). Of particular relevance is the Advisory Committee Note on the 1961 "automatic substitution" amendment to Rule 25 (d), which suggests that "[i]n general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office." See *id.*, ¶ 25.09 [3], at 25–403, 25–404. The question of whether corrective behavior is thought to be necessary is, of course, dependent on whether the dispute with the predecessor continues with the successor.

which they complain. The plain fact is that, on the record before us, respondents have never charged Spomer with anything and do not presently seek to enjoin him from doing anything.[10] Under these circumstances, recognizing that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro*, see *Two Guys* v. *McGinley*, 366 U. S. 582, 588 (1961), we remand to the Court of Appeals for a determination, in the first instance, of whether the former dispute regarding the availability of injunctive relief against the State's Attorney is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief

[10] Despite the statement respondents made in their brief in opposition to the petition for certiorari, n. 8, *supra*, the record does not contain any indication that respondents have ever sought injunctive relief against Spomer in any proceedings in the District Court or the Court of Appeals. Nor would they have had reason to do so in the absence of knowledge that he would succeed Berbling. While Spomer did substitute himself in place of his predecessor, and his counsel made the somewhat extraordinary statement at oral argument that "there is nothing in this record, nor will there be on the part of my client, to indicate that he would change the policies which are alleged to have been exercised by his predecessor," Tr. of Oral Arg. 7, to determine whether respondents have a live controversy with Spomer, we must look to the charges *they* press. Indeed, counsel for respondents observed at oral argument of this case that "in order for us to proceed against Mr. Spomer, it would be necessary for us to investigate the facts to see that the concession apparently made by the State's Attorney is true and amend our complaint." *Id.*, at 19. This merely serves to underscore our concern that we are being asked to render an opinion on the merits of what is now and may continue to be a hypothetical or abstract dispute. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937); *United States* v. *Fruehauf*, 365 U. S. 146, 157 (1961); *North Carolina* v. *Rice*, 404 U. S. 244, 245–246 (1971).

against the petitioner. Cf. *Land* v. *Dollar,* 330 U. S. 731, 739 (1947).

The judgment of the Court of Appeals is vacated and remanded for further consideration and proceedings consistent with this opinion.

It is so ordered.